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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 552

WILLIAM W. McBOYLE, PETITIONER,

vs.

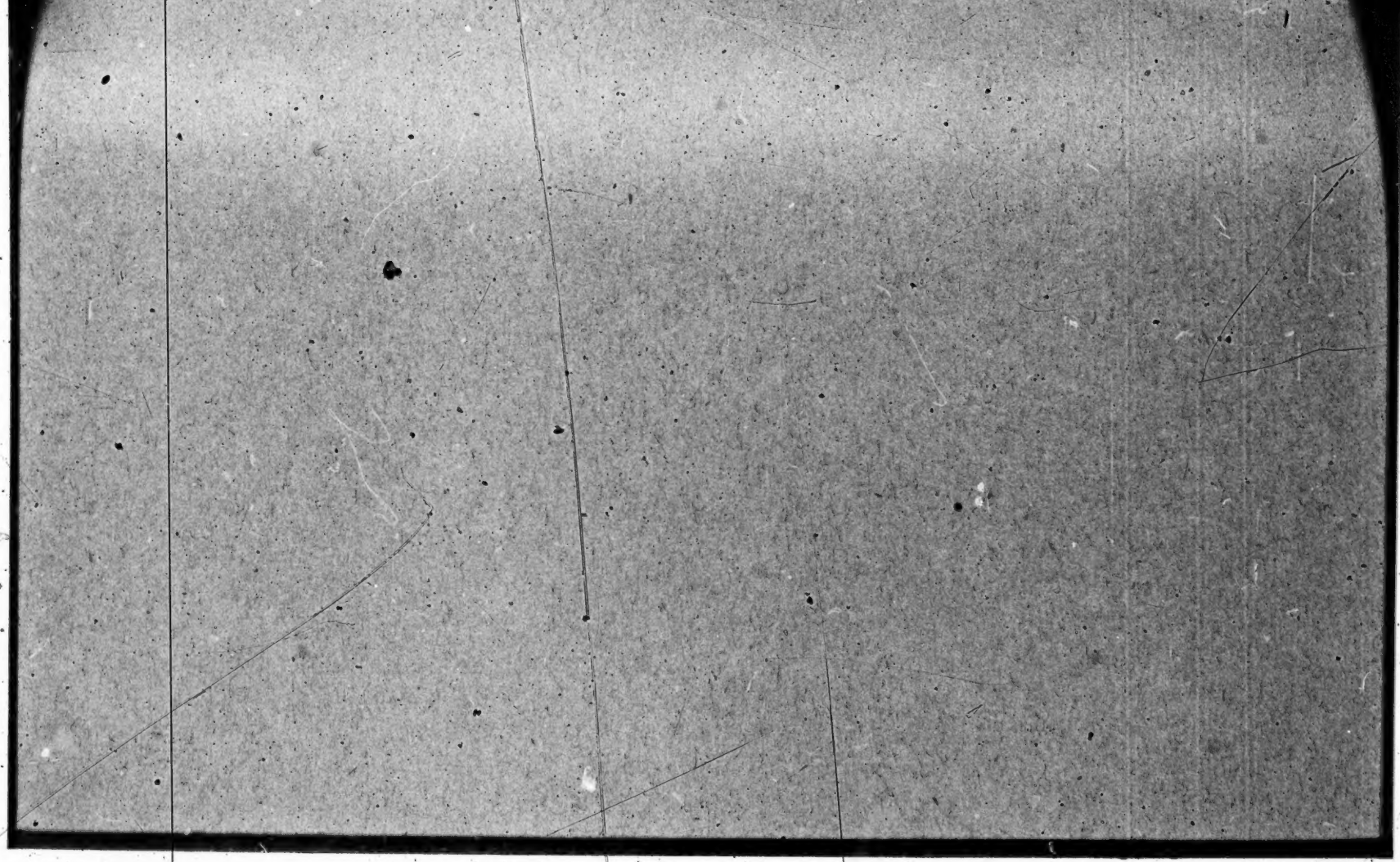
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 17, 1930

CERTIORARI GRANTED JANUARY 12, 1931

(35,474)



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Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the June Term, 1930, of said Court, before the Honorable John H. Cotteral, the Honorable Orie L. Phillips and the Honorable George T. McDermott, Circuit Judges.

Be it remembered that heretofore, to-wit: on the thirtieth day of December, A. D. 1929, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the Western District of Oklahoma, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein William W. McBoyle was Appellant and United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit under the supervision of its Clerk, is in the words and figures following, to-wit:

(Citation in proper form, directed to appellee, was issued on Sept. 19, 1929, and service of said citation was accepted by counsel for said appellee.)

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2 In the District Court of the United States for the Western District of Oklahoma.

United States of America, Plaintiff, vs. William W. McBoyle and A. J. "Steve" Lacey, alias Pat Sullivan, Defendants. No. 6809.

Notice of Appeal to United States Circuit Court of Appeals.

To Theodore Filson, Clerk of the United States District Court in and for the Western District of Oklahoma:

To Roy St. Lewis, United States District Attorney in and for the Western District of Oklahoma:

You and each of you are hereby notified that the defendant, William W. McBoyle, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the judgment and orders entered in the above entitled cause on the 29th day of June, 1929, said appeal being from the judgment then entered, and from the entire record.

Dated this 19th day of September, 1929.

WILLIAM W. McBOYLE.
By DALE, BROWN & HOYLAND,
Attorneys for said defendant,
Guthrie, Oklahoma.

Service of petition for appeal, assignment of errors, and notice of appeal in the above entitled cause, is hereby acknowledged and accepted this 19th day of September, 1929.

ROY ST. LEWIS,
United States District Attorney.
By.....

Endorsed: Filed in District Court on Sept. 19, 1929.

(Omitted: Orders of Oct. 25, 1929, and Nov. 25, 1929, extending time in which to docket case in Circuit Court of Appeals.)

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5 William W. McBoyle, Appellant, vs. United States of America, Appellee. Appeal from the U. S. District Court for District Court of Oklahoma.

Order.

It is this day ordered, for good cause shown, that the time in which the said appellant may docket said case and file a transcript of the record herein, in the United States Circuit Court of Appeals, be and the same is extended to January 6, 1930.

December 26, 1929.

EDGAR S. VAUGHT,
6809 U. S. District Judge.

Endorsed: Filed Dec. 26, 1929. Theodore M. Filson, Clerk. By Grace G. Butler, Deputy.

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6 In the District Court of the United States for the Western District of Oklahoma.

United States of America, Plaintiff, v. William W. McBoyle, and A. J. "Steve" Lacey, alias Pat Sullivan, Defendants. No. 6809.

Indictment.

Violation National Motor Vehicle Theft Act.

At the January 1928 Term of the District Court of the United States for the Western District of Oklahoma, begun and held at the city of Oklahoma City, in said District, on the 16th day of January, in the year of our Lord one thousand nine hundred twenty-eight, the Grand Jurors of the United States of America, within and for said District, having been duly summoned, empanelled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Oklahoma, upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present:

7 That on the 10th day of October, 1926, in Texas County, in the Western District of Oklahoma, and within the jurisdiction of this court, one William W. McBoyle and A. J.

"Steve" Lacey, alias Pat Sullivan, whose more full, true and correct names are to the Grand Jurors unknown, then and there being, did then and there unlawfully, knowingly, wilfully and feloniously transport, and cause to be transported in interstate commerce, that is to say, from Ottawa, in the State of Illinois, to Guymon, in the Western District of Oklahoma, a certain motor vehicle, to-wit: one Waco Airplane Motor No. 6124, Serial No. 256, which had theretofore been stolen from the owner thereof, the United States Aircraft Corporation, a corporation created and existing under and by virtue of the laws of the State of Illinois; they, the said William W. McBoyle and A. J. "Steve" Lacey, alias Pat Sullivan then and there well knowing the said described motor Vehicle to have been stolen;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

LESLIE E. SALTER,
Assistant United States Attorney.

Endorsed: A true bill, L. A. Macklanburg, Foreman. Returned and Filed in open court this 18th day of January, A. D. 1928. Theodore M. Filson, Clerk.

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8 ● (Trial, May 24, 1929)

(Before Judge Vaught)

On this 24th day of May, 1929, the plaintiff appears by Roy St. Lewis, Esq., United States Attorney, and Fred A. Wagoner, Esq., Assistant United States Attorney, and the defendant in person and by R. P. Edler, Esq., Robert A. Milroy, Esq., and Messrs. Dale, Brown & Hoyland, his attorneys. The defendant is arraigned upon the indictment herein, and upon such arraignment, enters his plea of not guilty as charged therein. All parties announce ready for trial, and the following jury, to-wit: Burton Dicks, Ray G. Fisher, E. L. Halsted, Roy Harmon, A. S. Hiatt, Carson Kelly, E. H. Ladner, George Leatherman, Loyd Lambert, Ben Long, G. W. Moelling and J. F. Marshall, is accepted, sworn to try said cause, and a true verdict render. Counsel for plaintiff states its case to the jury, and the defendant reserves his opening statement until the close of evidence on behalf of the plaintiff. Thereupon, on application of the defendant, the rule on witnesses is invoked, the witnesses sworn and excluded from the court room until called to testify. The Plaintiff presents evidence and proof and rests, and at this time, the defendant demurs to

the evidence on behalf of the plaintiff, and moves for directed verdict, arguments of counsel are heard thereon, and the Court being duly advised in the premises, it is ordered that said demurrer and motion be and the same are each overruled and exceptions allowed the defendant. At this time, the hour for adjournment of court having arrived, the court admonishes the jury and further trial herein is continued to May 25th, 1929, at 9:30 A. M.

---

9 (Trial, May 25th, 1929)
(Before Judge Vaught)

On this 25th day of May, 1929, this cause comes on for further trial, and all parties are present in person and by counsel as heretofore, and the jury is each and every member present. Counsel for defendant states his case to the jury, and the defendant presents his evidence and proof and rests, and the plaintiff presents evidence and proof in rebuttal and rests, and the taking of evidence is closed. At this time, the defendant renews his demurrer to the evidence on behalf of the plaintiff and his motion for directed verdict, and the court being duly advised in the premises, it is ordered that said demurrer and motion be and the same are each overruled and exceptions allowed the defendant. At this time, the hour for adjournment of court having arrived, the court admonishes the jury, and further trial herein is continued to Monday, May 27th, 1929, at 9:30 A. M.

---

10 (Trial, verdict of guilty, May 27th, 1929)
(Before Judge Vaught)

On this 27th day of May, 1929, this cause comes on for further trial, and all parties are present in person and by counsel as heretofore, and the jury is each and every member present. Arguments of counsel are heard, and the court instructs the jury as to the law in the case, and the jury retires in charge of a sworn bailiff to a jury room to deliberate upon its verdict herein.

Now, on this same day, to-wit, May 27th, 1929, the jury returns into open court, in charge of a sworn bailiff, with all members present, and all parties are present in person and by counsel as heretofore. The jury being asked by the Court if they have agreed upon a verdict herein, through their foreman, answer they have and present to the Court their verdict,

which is examined by the Court, ordered read, filed and entered of record herein, which said verdict is as follows, to-wit:

We, the jury in the above entitled cause, duly impaneled and sworn, upon our oaths, find the defendant, William W. McBoyle, Guilty, as charged in the indictment.

CARSON KELLY,
Foreman.

Endorsed: Filed May 27, 1929. Theodore M. Filson, Clerk. By Glenn H. Grubb, Deputy.

The jury announcing this to be their true verdict are excused from further consideration of this cause. It is thereupon ordered that motion of the defendant for new trial be assigned for hearing in Federal Court Room at Guthrie, Oklahoma, on June 17th, 1929, at 9:30 A. M., and the defendant is allowed to stand on his present bond.

---

11 Motion to Arrest Judgment, Vacate Verdict, and for a New Trial

(Filed June 6, 1929)

To Honorable E. S. Vaught, Judge of the United States District Court, in and for the Western District of Oklahoma:

Comes now William W. McBoyle, defendant in the above entitled cause, by his attorneys, Dale, Brown & Hoyland, of Guthrie, Oklahoma, and shows to the court:

That on the 27th day of May, 1929, a verdict was rendered by a jury in the above entitled cause and court, whereby this defendant was found guilty of the violation of the National Motor Vehicle Theft Act, as charged in the indictment therein, which said indictment charges this defendant, as a co-defendant of one A. J. "Steve" Lacey, with the transportation in interstate commerce of a certain Waco airplane from Ottawa, Illinois, to Guymon, Oklahoma, knowing the same to have been stolen.

And now comes the said defendant, William W. McBoyle, by leave of court, and respectfully moves the court to stay and arrest judgment upon the verdict rendered by the jury herein, to vacate and set aside said verdict, and to grant him a new trial for the following reasons and upon the following grounds, to-wit:

First.

Because the verdict of the jury is contrary to the law of the case.

Second.

Because the verdict of the jury is contrary to the evidence of the case.

Third.

Because the verdict of the jury is contrary to and in disregard of the instructions of the court.

Fourth.

12 Because of errors of law in the admission of evidence during the trial.

Fifth.

Because of errors of law in the instructions to the jury.

Sixth.

Because of the discovery of new evidence material to this defendant's rights, which this defendant could not with reasonable diligence have discovered and produced at the trial.

Seventh.

Because of surprise which ordinary prudence and diligence on the part of this defendant could not have guarded against, and which was not due to the negligence or fault of this defendant.

Eighth.

Because of error of the court in over-ruling the demurrer of this defendant to the evidence of the government.

Ninth.

Because of errors of law occurring at the trial and excepted to by the defendant.

Tenth.

Because of errors on the part of counsel for the government in the interpretation of copies of telegrams introduced in evidence, there being no evidence in the case to support such interpretation.

Eleventh.

The Court erred in overruling defendant's demurrer to evidence and motion to direct the jury to return a verdict of not guilty, made at the close of the case, to which order the defendant duly excepted.

In support of the above motion, defendant further
13 shows to the court that he is a resident of Dubuque, Iowa, and that he was during the year 1926, a citizen of Galena, Illinois, a short distance from the City of Dubuque; that the place of trial of this cause, Guthrie, Oklahoma, is almost a thousand miles from the place of residence of this defendant, and from the place of residence of the persons having knowledge of the facts relative to the charge in this indictment and who should be called as witness on behalf of this defendant.

That this defendant is a man of very limited means; that he did not know and had no way of knowing the nature of the evidence that would be adduced on the part of the government in this case; that he made diligent effort to bring and did bring to Guthrie, Oklahoma, for this trial such witnesses as he believed were proper for his defense, and who his counsel in the State of Illinois advised him would be proper and necessary for his defense.

But defendant further shows to the court that much of the evidence offered by the government in this case constituted surprise to him and to his attorneys, against which he could not guard himself and protect his rights; that after he learned the nature of some of the most important evidence adduced by the government, it became apparent that persons at Galena and certain other points in northern Illinois had knowledge of facts that would directly refute such evidence, and that would be very material to this defendant's rights in his defense of said cause, but that by reason of the great distance from Guthrie, Oklahoma, to Galena and other points in Illinois where such persons live, and the time and expense involved in securing their presence in court, it was impossible for him to subpoena and secure the presence of such witnesses in time for them to testify at the trial of said
14 cause, and that by reason of his inability to secure said witnesses his substantial rights have been materially affected, to his grave detriment; and defendant is informed and believes that if such evidence had been available in this trial, that it would have materially affected the result thereof.

Defendant further shows to the court that he has discovered new evidence in this case, and that if he is granted a new trial herein, he can and will produce a number of witnesses to testify in his behalf, whose evidence will substantially refute many of the most salient features of the evidence of the government and will materially aid in the defense of this defendant and in the protection of his rights as

a citizen of the State of Iowa and of the United States, and that he believes would change the final result in the above cause.

Wherefore, defendant moves the court to arrest judgment upon the verdict rendered in the above cause, to vacate and set aside said verdict and to grant him a new trial herein, upon the grounds hereinbefore set forth.

DALE, BROWN & HOYLAND,
Attorneys for Defendant, William W. McBoyle.

Endorsed: Filed in District Court on June 6, 1929.

---

15 Motion in Arrest of Judgment

(Filed June 29, 1929)

Comes now William W. McBoyle, defendant herein, and moves the court to arrest the judgment herein and hold the same for naught on the following grounds, to-wit:

First.

For the reason that the indictment herein does not state facts sufficient to constitute a cause of action against the defendant herein.

Second.

Because the indictment herein does not state facts sufficient to show that an offense has been committed against the laws of the United States.

Third.

The record in this cause is insufficient to sustain a judgment of guilty.

Fourth.

Because the records and indictment in this case plainly disclose that the court has no jurisdiction of the subject matter of the action.

Fifth.

Because the record in this case shows that the court has no jurisdiction of the person of the defendant herein.

DALE, BROWN & HOYLAND,
Attys. for Defendant W. W. McBoyle.

Endorsed: Filed in District Court on June 29, 1929.

---

16 (Order, Judgment & Sentence, June 29, 1929)
(Before Judge Vaught)

On this 29th day of June, 1929, the plaintiff appears by Roy St. Lewis, Esq., United States Attorney, and the defendant in person and by Messrs. Dale, Brown & Hoyland, his attorneys. Thereupon, motion of the defendant for new trial comes on for hearing, evidence is heard thereon, and affidavits are read, and the court being duly advised in the premises, it is ordered that said motion be and the same is overruled and exceptions allowed the defendant. Thereupon, motion in arrest of judgment comes on for hearing, and the court being fully advised in the premises, it is ordered that said motion be and the same is overruled and exceptions allowed the defendant, and,

It is thereupon by the Court here considered, ordered and adjudged that the defendant, William W. McBoyle, for the crime by him committed, as charged in the indictment, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, and confined for the term of Three (3) years from date of delivery, and that he pay a fine unto the United States in the sum of Two Thousand Dollars ($2000.00), and further stand committed until said fine is paid, or, until released by due process of law.

And it is further ordered that the Marshal of said District transport the said William W. McBoyle and deliver him to the warden of said United States Penitentiary at Leavenworth, Kansas, without delay.

To which judgment and sentence of the court, the defendant excepts, and asks and is granted ninety (90) days from this date in which to file bill of exceptions herein. It is further ordered that the defendant be released upon his appearance bond, and that said bond remain in force for the period of thirty days from this date. It is further ordered that bond on appeal be fixed in the sum of $2500.00, said bond to be filed within thirty days.

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20 (Omitted: Orders of Sept. 23, 1929, Oct. 25, 1929, and Nov. 25, 1929, extending time in which to file Bill of Exceptions.)

Order.

It is this day ordered, for good cause shown, that the said defendant be, and he is allowed until December 14, 1929, in which to present and file his Bill of Exceptions in said cause.

December 5, 1929.

EDGAR S. VAUGHT,
United States District Judge.

Endorsed: Filed Dec. 5, 1929. Theodore M. Filson, Clerk, By Grace G. Butler, Deputy.

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21 Bill of Exceptions.

Now on this 24th day of May, 1929, the above entitled and numbered cause comes on for trial at Guthrie, Oklahoma, pursuant to assignment, before Honorable Edgar S. Vaught, Judge, and a jury;

Appearances:

Roy St. Lewis, Esq., United States Attorney, and Fred A. Wagoner, Esq., Assistant United States Attorney, for the Government.

Arthur Milroy, Esq., R. P. Elder, Esq., and H. F. Brown, Esq., for the defendant.

The defendant being present in person, and all parties announcing ready for trial, a jury is empaneled and sworn according to law, and the following proceedings were had in said cause.

Thereupon, the opening statement was made by attorneys for the Government.

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22 Evidence on Behalf of the Prosecution.

Willard F. Bridgeman, testified on behalf of the Government, as follows:

My name is Willard F. Bridgeman. I live at Ottumwa, Iowa; in 1926 lived at Ottawa, Illinois.

In October, 1926, and a short time prior thereto and thereafter I was engaged in the automobile and airplane business with the United Aircraft Corporation, organized in the State of Illinois. I was president. The business was mostly carrying passengers. The corporation owned a Waco airplane. I do not remember the motor number; serial number is all.

"Q. Well, what was the serial number?

Mr. Milroy: That is objected to. That is calling for something that obviously will be the best evidence. The best evidence will be the number itself.

The Court: Well, if he knows. The best evidence would be the airplane but that is hardly practicable.

Mr. Milroy: That is not practicable, but it is practicable to produce the number.

The Court: If you know the number—

A. I am satisfied the number is 256.

The Court: Overruled.

Mr. Milroy: Exception."

In the airplane business more frequently serial numbers are used, as motors are changed at times. The serial number
of this Waco plane was 256. The first part of October,
23 1926, the plane was on the field about a mile south of
Ottawa. I was the pilot of the plane. The plane disappeared on the morning of October 6th, 1926. I did not know who took the plane until about October 20th, when I arrived in Guymon, Oklahoma. As president of the United States Airplane Corporation, I did not give anyone permission or authority to take that plane away from the field, nor to fly it to Guymon, Oklahoma, nor any other place outside of the State of Illinois, or within the State of Illinois. I first missed the plane about nine o'clock, October 6th. I went immediately to the police and sheriff, who wired and telephoned a radius of 100 to 200 miles around different airports and different cities, and the next day after not being able to get information about it, I wired the publishers of a weekly aviation magazine at New York and offered a reward of $500.00 for the capture of the thief or the return of the airplane in good condition. I did not hear of the airplane until October 19th. After hearing of it, receiving a wire from some boys at Guymon, Oklahoma, who had suspicioned the airplane as being a stolen machine. I took the train and went to Guymon, Oklahoma. When I got there I saw this Waco airplane that belonged to us. I made an examination of it to determine whether or not the serial numbers or motor numbers had been changed. They were changed to 249. I had an air cushion pilot seat which I had punctured, and had placed a cold patch on, a clot on the patch which was not put on by the manufacturer but which was put on by me and various
little scratches, etc., which identified the airplane and
24 couldn't possibly be anyone elses'. The plane was my
plane. It was the airplane belonging to the United Aircraft Corporation, Ottawa, Illinois.

I went to Guymon on the Golden State Limited on the Rock Island; passing through the little town of Inland, Kansas, which is a short distance outside of Hutchinson, I observed another Waco airplane of the same type and model as ours. After reaching Guymon, the sheriff told me that he had been in touch with Lacey, who had transported the original machine belonging to the United Aircraft Corporation out there. He had called over the telephone from Hutchinson.

"A. I found where there had been some telegrams exchanged between Lacey and some other party.....

Mr. Milroy: Objected to as hearsay.

The Court: Sustained."

I went back to Hutchinson, Kansas, and found that airplane there belonged to McBoyle. I had seen it before. I think it had the name "Mac" near the pilot's seat. I called up McBoyle at Galena, Illinois, and told him his airplane was there. I asked McBoyle what he wanted done with the airplane, if I could be of any assistance on it, that I found mine at Guymon and was bringing it back and McBoyle instructed me to bring the machine back. I made arrangements with a pilot to come out from Kansas City and return both machines to Monmouth, Illinois, and turned McBoyle's over to him at Monmouth.

I am engaged in both automobile and airplane business. I think the United States Aircraft corporation is not in existence. I am not in it. I am president of the Bridgeman-Smith Corporation, automobile distributors, and President of the Bridgeman Aircraft Corporation, located at Ottawa, Illinois.

Cross-Examination.

I first met Lacey sometime late in June or July of 1926. My ship disappeared about October 6th, 1926. I had seen Lacey possibly a week previous to that; I don't remember. Mr. Lacey frequently stopped in at the Ottawa airport, where I saw him just previous to October 6th. I had never seen Lacey before June of 1926. I did not know him when he was working for Mr. Neubaur at Hinkley. He never worked for me. I judge Hinkley, Illinois, is some thirty or forty miles from Ottawa, I don't know. I hired a pilot to take Mr. McBoyle's machine back from Hutchinson, Kansas. He settled for that I think directly with the pilot.

Arthur J. Lacey testified on behalf of the Government, as follows:

My name is Arthur J. Lacey; I reside at Minneapolis, Minnesota. I am 25 years old. Am an aviator. Have been an aviator for approximately nine years. I am the same A. J. Lacey, alias Pat Sullivan, that was indicted along with William W. McBoyle for transporting an airplane from Illinois to Guymon, Oklahoma. I have entered a plea of guilty to

that, have paid the penalty and am released from the penitentiary.

I first became acquainted with McBoyle on the 2nd
26 day of July, 1926, at Galena, Illinois. Mr. McBoyle had advertised for a pilot. I learned that he had and flew up to Galena from Hinkley, Illinois, where I was employed by Dr. Neubaur as a flyer. He had a field at Hinkley. I had charge of it. I met Mr. McBoyle and told him I was looking for a change in work. He asked me in regard to my qualifications, etc., and I satisfied him in that regard and he hired me on the 2nd day of July. He was to pay me $35.00 a week and 20% commission. I was hired up until January 1st, 1927. I commenced to work for him I believe on that day. My duties were to fly the airplanes that he had at the field, manage the airport and to conduct and contract for any flying business for that field. He was running what was known as a commercial airport. I was still working for him along in October, 1926. Along the first part of that month I had a conversation with Mr. McBoyle in regard to getting a plane. I believe it was the 5th day of October, 1926.

"A. On the fifth day of October, 1926, while I was employed by Mr. McBoyle, he called me to the office and instructed me to go to Ottawa, Illinois, and fly the airplane belonging to the Standard Aircraft or United Aircraft Corporation back to his field, and from there on to Amarillo, Texas. He told me that I should go to Amarillo, Texas, and arrange for a lease for an airport so we could operate there during the winter months. After instructing me, I left on the Oriental Limited from Galena at four o'clcok in the afternoon—

Q. On the 5th?

27 A. On the 5th day of October, and I arrived in Chicago, Illinois, about eight o'clock that evening. I inquired for train connections for Ottawa, Illinois, and I found the next train left at twelve o'clock p. m. I took the twelve o'clock p. m. train and arrived at Ottawa, Illinois, about four thirty in the morning and went out to the field—

Q. How far was this field from town?

A. Three miles south of town, and I cranked up the plane and flew it back to Galena, Illinois, arriving there about nine o'clock a. m. in the morning."

The plane was a Waco Model No. 9. It belonged to the United Aircraft Corporation of Ottawa. No officer, stockholder, or any one connected with that corporation gave me permission to take that plane. It was not taken with their

authority nor their consent. So far as I know Mr. Bridgeman nor anyone else saw me take it.

"A. I arrived at Galena about nine o'clock.

Q. On what day?

A. Nine o'clock on the morning of October the 6th as far as I can remember. Mr. McBoyle was on the field at the time and when I landed why he came up and asked me how I got along. I told him fine. He said, "Did anybody know that you have left Ottawa with the plane," and I said "not to my knowledge," and he said, "well, we better check over the motor and gas and oil up the machine and you better leave for Amarillo right away."

28 Q. What was done?

A. So we took the mantle off the motor—

Q. We took it off—who?

A. Mr. McBoyle and myself.

Q. Is Mr. McBoyle a mechanic?

A. Yes, sir.

Q. Go ahead.

A. We started to check over the motor. Mr. McBoyle asked me, "Do you know where the serial number of a Waco plane is located." I said "No, sir, I don't," and he started to look around for the serial number and finally found it on the right hand wing fitting where the flying wire is attached, and walked over to the hangar and got a file and started looking around for a set of dyes [dies], and he didn't have much success in finding it at first, and he was kind of cussing the mechanics around there and so forth and he finally discovered it after about half an hour, and we walked out and filed off the serial number off the wing fitting and stamped another number on it.

Q. Explain that, in filing that did he file it completely off and down?

A. Completely obliterated the old number.

Q. The old number was completely obliterated?

A. Yes, sir.

Q. Go ahead?

A. At first he said he was going to leave the number—it began with a "2" if I remember right and he was

29 going to change the last two numbers, but the dyes [dies] wouldn't match up and he filed off the complete number and put on another set of numbers.

Q. Do you remember those numbers?

A. I think the number that—

Mr. Milroy: That is objected for for the same reasons heretofore urged. It would not be the best evidence.

The Court: Well, if you know. If you have an independent recollection you may testify.

Q. (By Mr. Wagoner) If you knew and remember at this time state what the numbers were he put on?

A. My recollection was, the original number being 256—

Q. What did he put on in the place of 256?

A. 249.

Q. What did you do while he was doing that? Were you checking the motor?

A. No. I believe I was checking over the controls in the cock-pit. You mean while he was filing off the numbers?

Q. Yes.

A. Yes, I was working on the front at the time.

Q. Both of you were right there together at that particular job?

A. Yes, sir. Then the fitting was colored a blue enamel. Mr. McBoyle started looking around for some sort of
30 a paint that would match up with that enamel to cover over the numbers as it was originally. He finally got some blue Duco and painted it, and it was a slightly lighter color than the fitting so he waited until it was dry and he found it was a little lighter color and he reached up, the engine was rather greasy and rubbed his fingers across the number and rubbed the number and new paint with grease.

Q. Rubbed his fingers through the grease and rubbed his fingers over this blue paint?

A. Yes, sir.

Q. That made it look what?

A. As if it was original color.

Q. What was next done?

A. So we gassed and oiled the machine and Mr. McBoyle asked me how I was fixed for finances, and I told him I had some money, but I would need some money to get down to Amarillo. He said, "You can wire me any time you need money," and so, if I remember correctly he wrote me out a check for $150.00, and a man he had working there, a mechanic by the name of Smith just drove out to the field at the time and he asked him if he would take me down town and cash the check. I went down town to either the McBoyle service station or the bank, I can't recall which, and cashed the check for $150.00. I returned to the airport. McBoyle shook hands

with me. He said, "now you want to remember, under no circumstances are the stockholders or Bridgeman or anybody that may ask you to know where you are going,
31 and enroute if you stop at an airport and they ask you whose plane it is, why, it is none of their damned business." He said, "I want you to wire me when you arrive in Texas" or "in Amarillo and when you find out how the conditions are for the leasing of the field," and he said, "But you don't want to sign your own name to the wire." I said, "What shall I sign to it?" He said, "Well, you better make up some sort of a name." I said, "What name shall I use." He said, "You better use an Irish name, Pat Sullivan." So I agreed with him that any telegrams that I would send him that I would sign as Pat Sullivan and he agreed that any telegrams in return that he would sign them as George.

Q. Sign them as George?

A. Yes, sir. That was my understanding. Then he said, "Now you better be careful in your telegrams about referring to the plane that you are flying." He said, "You better take out a piece of paper and write down and we will agree on some sort of a code. So he suggested that I use, in referring to the airplane that I was flying, I should use the word stock in referring to the plane, and that in reference to the business at Amarillo, Texas, oil business or oil proposition. So with that understanding I left Galena about eleven or eleven thirty on the day of October the 6th and flew on to as far as St. Joseph, Missouri, where I stopped for the night.

Q. All right. Go ahead and tell what you did next?

32 A. The following morning I prepared the ship and I flew to a small town straight west, to the best of my recollection approximately 100 miles west of St. Joseph, Missouri. In the afternoon I stopped and hauled passengers and I stopped there for the night. The following day I flew to Brewster, Kansas, where I stayed that day and that night. My next stop was at Garden City, Kansas, where I stayed that night, and at Garden City I decided to fly straight to Amarillo. I left the following morning early. As I passed over Guymon, Oklahoma, I noticed a circus or a fair that was going on there and quite a large crowd of people and there was a field adjoining it, and it struck me it would be a good place to haul passengers and make a little money. So I landed at Guymon. As soon as I landed I walked up to a gentleman by the name of Mr. Clark—

Mr. Milroy: That is objected to, what he asked Mr. Clark.

The Court: Sustained.

Q. (By Mr. Wagoner) Did you find out afterwards who Mr. Clark was, whether he held any position there?

A. He is deputy sheriff at Guymon.

Q. About what time in the day did you get to Guymon?

A. It is my recollection, I believe it was in the neighborhood of—in the afternoon sometime, I couldn't recall.

Q. What day in October would you say that was you
33 arrived in Guymon?

A. I think the tenth day of October.

Q. It took you from the 6th to 10th on account of these stops you made?

A. Yes, sir.

Arthur J. Lacey, was thereupon recalled, and having been previously sworn, further testified as follows:

Direct Examination (Continued)

By Mr. Wagoner:

Q. Now, Mr. Lacey, having arrived in Guymon on the 10th of October, 1926, I wish you would state now from that time on what you did with that plane, any communications that you have had with Mr. McBoyle.

Mr. Milroy: We hesitated this morning about objecting to leading questions. Now I think the time has come when an objection should be interposed. Counsel is evidently just telling this man just what to testify to. I am willing for him to narrate anything that happened.

Mr. Wagoner: Well, just confine it to the last part of the question. Go ahead and state what you did from that time on.

A. Near the hangar at the field I had a conversation with Mr. Clark in regard to whether or not—

Mr. Milroy: Just a minute—

Mr. Wagoner: Don't tell that."

After I arrived at Guymon on the 10th of October, I
34 hauled passengers for the latter part of the afternoon, after getting permission to use the field and as it got dark I tied down the plane and went in town and registered at the hotel the first night.

"Q. Under what name did you register?

A. Pat Sullivan. I went over to the depot and sent a telegram to Mr. McBoyle, and then returned to the hotel for

the evening, I believe about nine or ten o'clock that evening I received an answer to the telegram.

Q. Mr. Lacey, have you the telegram that you received from Mr. McBoyle?

A. Not in my possession. I have it on file in Illinois.

Q. The original telegram or a copy?

A. Well, that I couldn't state, whether it is the original or copy.

Q. Do you have it here?

A. No, sir, I don't.

Q. Well, go ahead.

A. The following day I hauled passengers all day and at noon or in the afternoon I sent another telegram in answer to the one I received from McBoyle the evening before.

Q. How did you sign the telegram that you sent?

A. Pat Sullivan.

Q. And directed it to whom?

35 A. William McBoyle, Galena, Illinois.

Q. Do you remember what day it was you sent that telegram to McBoyle?

A. Well, I sent one on the 10th, or one and two on the 10th, and I believe one on the 11th day of October.

Q. At this time do you recall the contents or the substance of the contents of the telegram you sent to McBoyle in answer to the one you received from him?

Mr. Milroy: That is objected to. The telegram itself is the best evidence.

The Court: He is just asking if he does recall it. Overruled.

Mr. Milroy: Exception.

Q. (By Mr. Wagoner) Do you recall it?

A. Is that in answer to my first telegram?

Q. The first one you sent back, that you received from him, without stating what it is, do you recall in substance?

A. Yes, sir, I do.

Q. I now hand you Government's Exhibit No. 1 and ask you to examine it and state whether or not that is a copy and the contents of the telegram you sent from Guymon, Oklahoma, to McBoyle at the time you have just testified?

Mr. Milroy: Objected to on the ground that this is not the best evidence, and in the second place the original is

36 unaccounted for. If the original can be produced it should be produced. This is purely secondary proof without first explaining the absence of the original.

Mr. Wagoner: Let me state at this time I am asking to have this identified. I will produce evidence from the operator at Guymon that all of the original telegrams are destroyed within one year, and there is no original telegram to be had in this matter, and that this is a copy that was made at the time before the originals were destroyed.

The Court: You haven't shown that this is a copy that was made at the time that the original was made.

Mr. Wagoner: I haven't sought to introduce it yet.

The Court: Very well.

Mr. Wagoner: I am asking this for the purpose of identification.

The Court: Very well, answer the question.

Mr. Milroy: Exception.

A. Yes, sir.

Q. (By Mr. Wagoner) Now then, go ahead and state what occurred next after you sent this telegram you have just testified about.

37 A. I recall sending another telegram to Mr. McBoyle a few hours afterwards receiving—

Mr. Brown: Object to his statement as to what he received as being a conclusion, and not binding on this defendant.

The Court: Overruled.

Mr. Brown: Exception.

A. Receiving an answer approximately two or three hours later.

Q. On what date?

A. October 11th.

Q. Do you recall the substance of that telegram?

A. Yes, sir.

Q. I hand you Government's Exhibit No. 2 and ask you to examine that and state if that is a copy of the telegram you have just testified about.

Mr. Milroy: Same objection as to Government's Exhibit No. 1.

The Court: Overruled.

Mr. Milroy: Exception.

A. Yes, sir.

Q. Now what next?

A. Following the request of the telegram that Mr. McBoyle sent me I took the evening train on October 11th—

Mr. Milroy: I move that the answer be stricken because it indicates what the contents of the written document
38 were following the request of Mr. McBoyle.

The Court: It ought to be clearly within his own knowledge. If he remembers it his knowledge would be as good as the instrument itself as far as his own acts are concerned. Overruled.

Mr. Milroy: Exception.

A. I returned to Galena, Illinois.

Q. Before we leave that. You say you received a telegram on the 10th of October?

A. Yes, sir.

Q. And did you receive any on the 11th?

A. Yes, sir.

Q. And do you remember the contents of those telegrams that you received on the 11th?

A. All of them, yes, sir.

Q. Do you member how many there were?

A. I couldn't positively say whether I received two on the 10th or two on the 11th. I am sure there were three telegrams I received from him.

Q. I hand you Government's Exhibits 3, 4 and 5 and ask you to state whether or not those are copies of the telegrams you received from McBoyle on October 10th or 11th, or of October, 1926, at Guymon, Oklahoma.

Mr. Milroy: The same objection as to Government's Exhibits 1 and 2.

The Court: Overruled.

39 Mr. Milroy: Exception.

A. Yes, sir.

Q. Now, Mr. Lacey, go ahead and state what was done by you after the receipt of those telegrams.

A. Why, following the request, telegraphic request of Mr.

McBoyle, I returned on the afternoon train or late evening train from Guymon—

Q. What date?

A. October 11th, going directly to Galena, Illinois.

Q. From where?

A. From Guymon, Oklahoma.

Q. All right.

A. Where I immediately got in touch with Mr. McBoyle.

Q. At what place?

A. Galena, Illinois.

Q. State what the defendant wanted?

A. I asked Mr. McBoyle what the trouble was, what was in the air, and he said there had been considerable trouble stirred up in Ottawa.

Q. About what?

A. About the plane being gone. That he thought it was best for me to make an appearance at Ottawa or Galena to establish an alibi.

Q. What did you do?

A. So I asked him what I should do in order to convince somebody that I was in that country, in Illinois, and he said the best thing to do was to show up around Ottawa.

Q. Did you do that?

A. Yes, sir. So Mr. McBoyle gave me one of his planes, and I flew to Ottawa and walked up to the Sheriff and asked the sheriff if he wanted me, because McBoyle told me—

Mr. Milroy: We move that be stricken because it was outside of the presence of defendant.

The Court: Sustained for the present.

Q. (By Mr. Wagoner) After you talked with the sheriff, without stating what was said, what did you do?

A. I returned to Galena that same day.

Q. Do you remember what day of the month that was in October?

A. I would say it was on the 13th day of October.

Q. Go ahead.

A. I believe I stayed at Galena about three or four days, and I was sent by Mr. McBoyle to McGregor to consummate and complete a deal I was working on previous to my departure to Guymon, Oklahoma, in selling an airplane to a man by the name of Welch, a farmer at McGregor. This man

Welch wanted to learn to fly at the same time, so I left for McGregor in the plane I was to sell Welch, and I completed the deal and started to train him to fly at McGregor. I was at McGregor for about four or five days.

Q. That is McGregor, Illinois?

A. McGregor, Iowa. I think about four or five days.
41 I got a telephone call from Mr. McBoyle to return to Galena. I was a little delayed in getting away from McGregor and the following day I appeared at Galena.

Q. How did you travel from McGregor to Galena?

A. Mr. Welch drove me as far as, I believe he took me to Prairie du Chien, Wisconsin, across the river, and I took a train from Prairie du Chien to Dubuque and from Dubuque took a bus over to Galena.

Q. On your arrival at Galena did you see Mr. McBoyle?

A. No. When I arrived at the airport Mr. McBoyle was absent, and I asked Mr. McCall where he was.

Mr. Milroy: Objected to.

The Court: Sustained.

Q. (By Mr. Wagoner) Go ahead and state what was said—he was absent was he?

A. I learned he was arrested for—

Mr. Milroy: Objected to as to what he learned. That is hearsay.

The Court: Sustained.

Q. Well, do you know where he was?

A. Yes, sir.

Q. Where was he?

A. He was in jail.

Q. All right, go ahead. What happened?

A. I waited around the airport until late that evening
42 and the telephone rang and McBoyle called up from Ottawa and spoke to his wife for a said time, and then his wife turned the 'phone over to me, and I asked McBoyle what the trouble was, and he said he had flown to McGrath, Illinois, and had been arrested, and was down at Ottawa at the time, but everything was fixed up and he would be back the following day.

Q. Let's go back to when you came back from Guymon. Did you return again to Guymon or near Guymon?

A. Yes, sir.

Q. There at Galena or wherever the place was that you

left from, and tell the circumstances, how you came to go and by whose direction you went, if anyone's.

Mr. Milroy: Objected to as being leading.

The Court: It is leading. Sustained."

The following day or two Mr. McBoyle returned to Galena and called me to one side. He said, "Get down to Guymon as fast as you can and get the plane and fly her back here on this airport," and I said, "How should I go down?" and he said "You will have to fly one of my planes down." He named the plane, a Waco, 9. That was the same kind of plane I had flown down.

"A. I asked Mr. McBoyle what I should do with the plane when I got to Guymon, and he said, "You place that plane in the same place."

Q. Which plane, the one you were flying down?

A. The one I was flying down, place it in the same
43 place as the Ottawa plane, and return the Ottawa plane and said when they got out there to examine the numbers on the plane, why they will find out it is my plane and they will be holding the sack.

Q. What else was done before you left up there with that plane? Was there any the matter with you?

A. Well, we had to have a plane immediately, and just before leaving McBoyle pulled out a roll of bills and counted out $250 to defer my expenses.

Q. Tell about the trip from there down as far as you can, as far as you got.

A. I left Galena about 2:30 or 3:00 o'clock that afternoon, and flew as far as Milam, Missouri, enroute to Guymon when a water line broke on the engine. I noticed the motor was getting hot, the temperature gauge ran up to over 200 degrees, so I was forced down at Milam, Missouri, about two miles south and I immediately went into Milam and called McBoyle to the effect I had been forced down with a broken water line, and I thought I could repair it and as soon as I repaired it I would proceed on to Guymon, Oklahoma.

Mr. Milroy: That is objected to and I move that the reference to this wire be stricken out unless the wire be produced.

The Court: Overruled.

Mr. Milroy: Exception.

Q. (By Mr. Wagoner) All right. Did you fix the
44 water line?

A. Yes, sir, I obtained a water hose and fixed the water line. However, it was quite dark by the time I completed the repairs so I stayed at Milam, Missouri, that night. The following morning I left, proceeded on my trip to Guymon, Oklahoma, and as I approached Hutchinson, Kansas, why, the oil pressure dropped considerably and the motor started to knock and miss a little, and I was forced down in a farmer's field right on the south edge of Inman, Kansas.

Q. And that is close to Hutchinson?

A. Yes, but I don't know the exact distance. It is very close to Hutchinson. I realized then that I could not proceed any farther with this plane because the motor was in bad shape apparently, and I knew it would take considerable time to overhaul it, so I decided to leave it in the custody of the farmer on whose land I had just landed, and after consulting the farmer, he agreed to take care of the plane and I pulled it right close to his house and tied it down to an orchard and secured the plane properly, and I took out a notebook and wrote my name and Mr. McBoyle's name and address and cautioned the farmer not to allow anybody to touch the plane unless he had a written notice from myself or Mr. McBoyle. I went into Inman and took a bus into Hutchinson, Kansas, and registered at the Central Hotel.

Q. In what name?

A. Steve Lacey.

Q. Is that the first you registered in your correct
45 name, was it, on either of those trips?

A. Yes, sir.

Q. Go ahead.

A. Before leaving Galena the day before, McBoyle told me to wire the man who I left the plane in charge of at Guymon, Oklahoma.

Q. Who did you leave in charge of it?

A. A man by the name of Bob Heth. He told me to wire him and told him to have the plane gassed and oiled and prepared for my flight so when I arrived there I could make the change quickly and fly right away from there, so when I got to Hutchinson and registered at the hotel I put in a telephone call to Bob Heth at Guymon, Oklahoma, and he answered the 'phone, and I—

Mr. Milroy: That is objected to, what he said to Bob Heth.

The Court: Sustained.

Mr. Wagoner: He testified he was directed by the defend-

ant McBoyle to communicate with the man in whose custody he had left that plane at Guymon.

By the Court: That is all true, but that is not binding on the defendant.

Q. (By Mr. Wagoner) Go ahead; anyway you communicated with him?

A. I communicated with Mr. Heth.

Q. Did you learn where he was?

A. I learned he was in jail, arrested for the theft of
46 the Ottawa plane or having stolen property in his possession, so I asked Mr. Heth to allow me to talk to the sheriff and I talked to the sheriff.

Mr. Milroy: That is objected to.

The Court: Sustained.

Q. (By Mr. Wagoner) You did talk to the sheriff, did you?

A. Yes, sir.

Q. Then what did you do?

A. I turned around immediately and called Mr. McBoyle at Galena and informed him what had taken place, that the motor had gone out on me and that Bob Heth was in jail and asked for his instructions.

Q. Did he give you any instructions?

A. He said, "Get the plane back here." I said, "No, sir, I won't fly it back, wouldn't get far with it." "Well," he says "You better get back to Galena as fast as you can. You have got to get out of sight." I walked out of the booth, and as I went over to the desk I was informed by the clerk that four detectives were after me, so I immediately checked out of the hotel and hired a private car to drive me to Wichita, Kansas, and took a train at Wichita, Kansas, about eight in the morning and arrived at Kansas City, and found I had insufficient funds to reach Galena, so I wired Mr. McBoyle at Kansas City asking him to forward me twenty-five dollars immediately, and waited around the depot and received a wire in return a few hours later for thirty dollars and
47 attached to the wire was further instructions to get back as soon as I could. I took the noon train or late evening train out of Kansas City, and got as far as Keokuk or Quincy, I just forget which, and I had to lay over there all night, and then proceeded to Galena the following day.

Q. You arrived back at Galena the following day. What time in October would that be, as near as you remember?

A. Well, I judge it must have been, why then it must have been the 19th or 20th or 21st, somewhere in that neighborhood.

Q. What was done by you after that?

A. Why, I stayed around Galena and shortly after I returned, possibly three or four days, I noticed in the Chicago paper where there was a warrant for my arrest.

Mr. Milroy: Objected to and move that it be stricken.

The Court: Overruled.

Mr. Milroy: Exception.

A. After seeing the warning in the paper I decided to take the matter up with Mr. McBoyle, and I talked to him concerning it and he told me not to feel worried about it, he would go down to Ottawa and straighten the matter out and he left for Ottawa that day or the following day, and the third or fourth day after his departure from Galena for Ottawa I received a telegram from the sheriff and
48 chief of police—

Mr. Milroy: That is objected to, any communication.

The Court: You may state the substance of it.

A. I received a telegram from the chief of police to the sheriff. I continued to work for Mr. McBoyle up until December 28, 1926, and on that date I quit.

Q. Then, Mr. Lacey, you worked for Mr. McBoyle from along in July, 1926, up until in December, 1926?

A. Yes, sir.

Q. And as I understand you, you took this plane October 6, 1926?

A. Yes, sir.

Q. And was he paying you the same amount of wages all the time?

A. Yes, sir."

Cross Examination of A. J. Lacey:

I am not a licensed pilot; I was never licensed; never had a license from the Department of Commerce, have been flying planes approximately nine years. I was born in 1904 in St. Paul, Minnesota.

I first met Mr. McBoyle July 2, 1926. I heard through aviation circles that he wanted a pilot. At that time I was working for Dr. Neubaur at Hinkley.

I was not at McBoyle's field at Galena on June 15th.

"Q. And he asked you at that time if you were not
49 driving a Yacki Sport plane, a Yacki T. M. Scout, referring now to about the 15th of June?

A. I believe I recall of flying Dr. Neubaur's Sport Yacki Scout at that time.

Q. That is the plane you sold to Joe Jungwirth, is it?

A. I never sold any plane to Joe Jungwirth.

Q. Isn't it true you sold a plane to Joe Jungwirth and afterwards Joe learned it was a stolen plane, and it was taken away from him?

A. Absolutely not."

I know Joe Jungwirth. I went to work for McBoyle shortly after the 2nd of July, 1926, to the best of my recollection. I took the Doctor's plane to Hinkley and then came back to Galena; I drove my car there. I went to work for McBoyle from that time on. He paid me $35.00 a week and 20% commission. I devoted my entire time to the work for McBoyle.

"Q. It is true though, that you did a little flying on your own hook at that time, isn't it?

A. Not any at all.

Q. You didn't?

A. No, sir.

Q. Let me show you something. Maybe it will refresh your memory. Look at these pieces of paper marked respectfully Defendant's Exhibits 1, 2 and 3, and without
50 stating anything about the contents at this time, do you wish to change the answer to the last question?

Note: (These Exhibits apparently were not introduced in evidence).

A. Not at all, no, sir.

Q. Did you have those printed?

A. I believe I did.

Q. Can you recall where you had them printed?

A. To the best of my recollection they were printed at Galena, Illinois, either under my instructions or under Mr. McBoyle's instructions."

During August, 1926, I did some exhibition flying. All the flying I did at that time between July—up until December 28th was done for the McBoyle Aviation Company. I flew McBoyle's plane. There were some times, naturally, that I had to do flying in other person's planes, but that flying was contracted for by the McBoyle Aviation Company and under the McBoyle Aviation Company.

"Q. About sometime in July of 1926 you borrowed a plane from McBoyle and went down near Sheridan, Illinois, didn't you?

A. No, sir, I never borrowed a plane from him.

Q. Isn't it a fact you told him that there was some considerable money to be made down there giving rides to people and putting on exhibitions, and if you borrowed his plane, you and McBoyle agreed to divide the proceeds, you
51 were to furnish the skill in flying and he was to furnish the plane?

A. That is absolutely untrue."

I did go down to Sheridan in a standard plane. I had a slight accident. I wouldn't exactly call it a crash. I came down because I decided it was the best thing to do. The plane was slightly damaged.

"Q. Were you there at that airport, at McBoyle's airport practically all of July?

A. No. The activities of the field were such as required my time in various sections of the country. In fact, we did flying practically all over the middle western states as far as that is concerned, so naturally I wasn't at the airport, not during the good flying season, I wasn't at the airport but a small portion of the time.

Q. However, you were on the payroll you say?

A. I was on the payroll all the time.

Q. Did he pay you weekly?

A. Yes, sir, he paid me weekly.

Q. Could you give us your best judgment as to how much money both in salary you got from him during the month of July, 1926?

A. No, that would be really hard to say. I received a weekly payment of $35 a week which was always to be at his service station on the cash register, whoever was in charge of the service station.

52 Q. But you did get paid every week?

A. Yes, sir.

Q. That is, your salary every week?

A. Yes, sir.

Q. You haven't any idea how much that amounted to, have you, I mean for that month?

A. No, not for that month. I remember we divided the commissions I believe for the month of July or the middle of August, up to the middle of August, and then from then

on there were no commissions deducted, and at the time I quit McBoyle we made satisfactory financial arrangements in view of the commissions he owed me at that time a considerable amount of money which I didn't get at that particular time.

Q. Did you and Mr. McBoyle have any argument about finances when you quit?

A. No, not over finances, not at all."

Minneapolis is my folks' residence. I came to Guthrie from New York. I had been in New York City about a week. Before that I was at Ottawa, Illinois, possibly a week or so. Before that I was at Peoria, Illinois, a couple of days. Before that I was at Chicago a couple of days.

"Q. Where before that?

A. The Federal Reformatory at Chilicothe, Ohio.

Q. How long?

A. Nine months and eighteen days.

53 Q. Now at this Federal Reformatory you were there for the theft of a plane down in Indiana, weren't you?

A. For the transportation of a plane, yes, sir.

Q. Was that the Anderson plane?

A. That was McBoyle's plane, at least he claimed it.

Q. Was that taken from a person by the name of Anderson?

A. Anderson claimed it so it come up in court finally.

Q. You pled guilty to it, didn't you?

A. Yes, sir, I did.

Q. Is that the first stolen plane you had anything to do with.

A. Yes, sir.

Q. Now then, when it came along about October 5th, you say McBoyle told you to go down to Ottawa and get that plane?

A. Yes, sir.

Q. You knew that was stealing, didn't you?

A. Yes, sir.

Q. Did you raise any objection to that?

A. No, not the way McBoyle put it up to me.

Q. You have answered. You didn't raise any objections.

Mr. Wagoner: Go ahead and explain your answer.

Mr. Milroy: You can bring that out if you want to.

54 Q. (By Mr. Milroy) Mr. Lacey, do you know about what the value of a plane is, of that plane that you went down there and got?

A. Yes, sir.

Q. Now [How] much about would it be worth?

A. New or as it was?

Q. As it stood then.

A. I would judge about $2200.

Q. You were willing to take $35 a week to go and steal a $2200 plane, were you?

A. Well, that wasn't at that time. There was no understanding that the plane was to be stolen.

Q. But you were just going down there and take it without the owner's consent, is that the idea?

A. No, on Mr. McBoyle's instructions.

Q. You didn't ask anybody if you could take it, did you?

A. I didn't think it was necessary.

Mr. St. Lewis: If he is going into the other stolen car the Government on redirect examination is going to ask to be allowed to go into that. In other words, we are objecting to going into another transaction, but if they open it up and want to go into the second airplane deal the Government wants to reserve the right to go into that on redirect
55 examination with this witness.

The Court: Well, you can do that. They certainly would have a right to ask this witness about that going to the credibility of this witness. Overruled. Then he can explain anything that they bring out. He can explain it for the Government.

Q. (By Mr. Milroy) Mr. Lacey, you went down and you didn't take anybody and just cranked up the plane and flew away with it. Is that right?

A. Yes, sir, that is correct.

Q. How long did it take you to get from Ottawa to Galena?

A. Well, I judge the flying time was around about three hours, in the neighborhood of about three hours.

Q. Well, is that from your recollection or from your knowledge as an aviator?

A. Well, I would say from my knowledge as an aviator.

Q. But you don't recall how long it took you exactly, do you?

A. No, sir.

Q. How many times did you go over this story that you told here on direct examination?

A. In what reference, what do you mean?

Q. How many times did you tell the story you have told here on the witness stand?

56 Mr. Wagoner: To whom and when?

Mr. St. Lewis: I want to object to the question as being indefinite, incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case.

The Court: Sustained, unless you indicate just what you mean.

Mr. Milroy: All right.

Q. (By Mr. Milroy) Mr. Lacey, referring to the testimony you gave here this morning, when was the first time you carried those facts to anyone after October 6th, 1926?

A. I believe about June 16th, in Montana.

Q. To whom did you relate it?

A. I related it to a Department of Justice agent.

Q. Who was that?

A. Mr. Costello.

Q. And you told Costello this whole story?

A. I gave a written statement to Mr. Costello of the true facts of this situation.

Q. The same facts as you related this morning?

A. The same facts, yes, sir.

Q. Well, now, that was the June following this occurrence, wasn't it?

A. Yes, sir.

Q. In other words, that was June, 1927?

A. Yes, sir.

Q. How did you happen to be out in Montana?

57 A. I was flying in Montana.

Q. Where did you fly from?

A. I flew from Minneapolis, Minnesota.

Q. That plane that you flew out there was a stolen plane too, wasn't it?

A. It was the same plane I was flying for McBoyle for four months.

Q. Answer the question. Was it a stolen plane or wasn't it?

Mr. St. Lewis: I submit he has answered the question.

The Court: Overruled. Answer the question directly. Then you can make your explanation.

Q. (By Mr. Milroy) It was a stolen plane, was it?

A. As far as I know I believe it was.

Q. Well, you did know you stole it, didn't you?

A. Yes, I went down and flew it away.

Q. Now, you sold that plane to a man in Minneapolis, didn't you?

A. Yes, sir.

Q. And then stole it from him?

A. No, sir.

Q. How did you get it out to Montana then? Did you just walk up and take it like you did the other one?

A. With this explanation, yes, sir.

Q. Were you apprehended out there in Montana?

A. Yes, sir.

58 Q. By whom?

A. I wasn't apprehended, I would like to recall that statement. I was notified by long distance that the Department of Justice had an aviation warrant out for me at Sidney, Montana, and I called the sheriff at Sidney, and confirmed that information. I wired and I told him I would be over the next day and I flew over and gave myself up to the sheriff at Sidney, Montana."

The ship I had in Montana is not the same ship involved in this case here. From Montana I was taken to Oklahoma City. That was in connection with this case, the same case Mr. McBoyle is being tried on now. I stayed there about two days. I got here possibly the latter part of July, 1927.

"Q. Now, to get back to this Ottawa ship. I think you said on direct examination this morning that when you went to Galena that Mr. McBoyle filed off the serial number, 256 off of the fusilage. Is that right?

A. Not off of the fusilage but off of the wing fitting."

That was the Ottawa plane. That was the only place that the serial number appeared to my knowledge; Mr. McBoyle found the place and I know of no other place to put serial numbers on the plane. They were depressed numbers. He had to file off part of this wing fitting to obliterate the numbers.

The wing fitting is made of steel.

59 "Q. That is hardened steel, isn't it?

A. Not hardened, no, sir.

Q. Isn't it from Vanadium steel?

A. Not in that type of plane. It is just a soft, good quality steel."

He used just an ordinary machinist's file. As near as I recall it was what they call a half round file, half-back file, regular steel file. The numbers were not depressed very deep. I coudn't say definitely in millimeters. I wouldn't guess the depth of them.

"A. The wing fitting is fastened at the lower corner of the fusilage, and it is made to support or to attach to the flying wires which are attached to it. It is a flat piece of steel I would say about an inch and a half in width, and possibly three-quarters of an inch long.

Q. That is close enough. And these numbers were sunk into that. In other words, they were not imbossed letters?

A. No, they were depressed letters."

I wouldn't guess how deep the numbers went into this wing fitting. You could notice it all right. Just read the numbers. I couldn't even say how large the numbers were. I couldn't say how much of the wing fitting a man would have to file off to obliterate those figures; not very much.

"Q. You say when Mr. McBoyle filed these numbers off he seemed to be somewhat angry that he couldn't locate the dyes to put new numbers on. Is that right?

A. Yes, sir, that is right.

60 Q. And you have said on your direct examination that he cussed out the mechanic because he couldn't find the dyes?

A. Yes, sir.

Q. How many mechanics were around there when this number changing business was going on?

A. There? There were no mechanics at all.

Q. Nobody but you and McBoyle?

A. There was a carpenter working on top of the hanger at that time.

Q. Was he the only person?

A. To my knowledge, yes."

I would say I got in there about nine o'clock. The first person I met was McBoyle. I did not meet Charlie Westwick. I know him. Just myself and McBoyle were present

when I had the conversation about going down to Ottawa and getting this plane. That was on the 5th of October.

"Q. Mr. Lacey, then you say that McBoyle finally got hold of these necessary dyes and sunk a new number into this, what do you call that?

A. Wing fitting.

Q. How long did that operation take him?

A. Well, I couldn't state just how long."

I was there about two hours or a little more. During that period the numbers were changed. I went down and got a check cashed, the motor on the plane was checked over,
61 and I checked the controls. Oil and gas were put in the plane. McBoyle and I did all the work except putting in the oil and gas. And McBoyle searched around and found something to cover up the places where the new numbers were put on. All of that was done in about two hours. I would estimate it took about five or six minutes to file the numbers off. Number 249 was put on in place of the number filed off. That was everything that was done before I left. Everything was done according to McBoyle's instructions before I left. That is all I can recall was done.

When I started out from there I started from Galena; did not start for McGregor, Iowa. At the time the work was being done, the servicing part, I would say the plane was located fifty yards or so from the hangar. That would be probably sixty yards from the highway, that is a cement state highway, No. 5, Galena, Illinois.

I did not start for McGregor when I left Galena. My intention was to go to Amarillo, Texas. That would take in the neighborhood of between eighteen and twenty hours, with good weather conditions. I spent four days enroute. It was not my intentions or instructions to go to Amarillo immediately.

"Q. Is Pat Sullivan the only name you have used besides Steve Lacey, A. J. Lacey?

A. I believe I have used another alias.

Q. Just what is it?

A. I just don't recall.

Q. It wasn't Bower was it?

62 A. Yes, sir, George Bower.

Q. Was that when you were in the Marines?

A. Yes, sir.

Q. Have you got a discharge from the marines?

A. No, sir.
Q. When did you join them?
A. You mean the naval air service?
Q. Yes.
A. 1920.
Q. That would make you 16 years old wouldn't it?
A. Yes, sir, I was 16 when I joined.
Q. When did you desert?
A. I didn't desert.
Q. What did you do?
A. I have a discharge.
Q. Dishonorable?
A. No, sir.
Q. I thought you said you didn't have one.
A. I said I didn't have one from the marine corps.
Q. Were you a member of the marine corps?
A. I was a member of the naval air service.
Q. Didn't you ever join the marine corps?
A. Yes, sir.
Q. You deserted from that didn't you?
A. No, sir.
Q. Have you got a discharge from it?
A. Yes, sir,
63 Q. Where is it?
A. At home.
Q. How long were you in the marine corps?
A. I would say about twenty months.
Q. How long did you enlist for?
A. Three years I believe.
Q. You were at one time stationed at Quantico, West Virginia, weren't you?
A. No, sir.
Q. Never?
A. Quantico, Virginia, yes, sir.
Q. That is during the period of time you belonged to the marines?
A. Yes, sir, there and San Diego, California.
Q. You enlisted for three years you say?
A. Yes, sir.
Q. And you served about twenty months of that?

A. Yes, sir.

Q. How did that come?

A. Why, I was enlisted under the stipulation that in the event I was found disqualified for flying services or could not pass the examination that I would be discharged upon recommendation of the commanding officer.

Q. Do the marines have to do with flying too?

A. Yes, sir, the naval air service, attached to the naval air service.

Q. You had flown a plane up to that time or had you
64 ever flown a plane up to that time?

A. Yes, sir, a plenty."

I started flying the latter part of 1919. I was fifteen years old when I first flew. Sometime after I came back from Guymon I went out to McGregor and sold a plane for McBoyle on commission, to this man Welch. I am pretty sure that it was when I arrived back from McGregor that I learned that McBoyle had been arrested on account of this plane deal. I couldn't say that McBoyle was in the custody of the state authorities of Ottumwa when he was talking over the phone. I did not say on direct examination that I talked to the sheriff at that time. I did not have a thing in the plane when I left Galena for Amarillo, except my suit case. My personal clothes.

Redirect Examination.

By Mr. Wagoner:

"Q. Mr. Lacey, you have been asked about the theft of an automobile in Indiana, an airplane.

A. Yes, sir.

Q. Go ahead and tell the jury about that theft, tell them all about it.

A. Why, on July 12th, 1926, Mr. McBoyle sent me to Richmond, Indiana, to fly a plane away from the Richmond, Indiana, field, stating that as his reason that a man by the name of Anderson at Richmond, Indiana, had hi-jacked his plane
while McBoyle was flying a load of whiskey down to
65 Keokuk, Iowa, and that Anderson had the plane in his possession, and Mr. McBoyle wanted me to recover it. So I left Galena on about the 12th day of March or of July and I drove down to Richmond, Indiana, and looked the airport over there and found the plane.

Q. How did you drive down there?

A. I drove down in my car. I found the plane Mr. Mc-

Boyle described and I put my car in the garage that night, and went to the hotel and stayed for the night and put in a call for early morning about four o'clock, and the next morning I flew the plane away, and flew it back to Galena, Illinois.

Q. You put in a call for who?

A. I put in a call at the hotel to raise me at four o'clock in the morning. I flew the plane back to the Galena airport and turned it over to Mr. McBoyle, and I flew that same airplane off and on for Mr. McBoyle on his airport and throughout the middle west for a period up until September, approximately the 9th of September."

For that reason I was sent to the Federal penitentiary; was serving my term when I entered my plea in this case.

"Q. And you were sentenced to the penitentiary in this case for McBoyle?

A. Yes, sir.

Mr. Milroy: That is objected to.

The Court: That is leading and suggestive.

66 Mr. Wagoner: He testified to it.

Mr. Milroy: I ask that it be stricken.

The Court: The jury will not consider that last part of his sentence or answer where he said he was sentenced for McBoyle."

"Q. How did you come to go to Montana?"

In September I asked McBoyle if I could take a few days leave so my wife and I could visit my folks in Minneapolis; I intended going by train. McBoyle was rather reluctant about giving me leave due to the fact it was the flying season and he suggested I take one of the planes and take my wife and fly to Minneapolis over the week-end and visit my folks, so I got my wife and left Galena in this same plane that I went to Richmond and got for McBoyle and flew to Minneapolis. The following day I went out to the port; the manager, a man by the name of Nelson, wanted to buy the plane; I referred him to McBoyle at Galena. So we all went to Nelson's office, including five or six parties, and put in a long distance call for McBoyle at Galena. Nelson talked to McBoyle for a period of eight or ten minutes in the presence of five men and consummated the deal over the phone and handed the phone over to me for verification; McBoyle told me I should get equivalent to $1400.00 for the plane, but at the lowest, to sell it for $1100.00. Said he would take in the

used plane. So that evening I closed the deal with Nelson for the Waco plane for $900.00 in cash, a Thomas-Morris Army pursuit plane, obsolete, in trade for the Waco. I signed a bill of sale for McBoyle Aviation Company
67 per. Steve Lacey. I flew the plane back and turned the plane and bill of sale for the Thomas-Morris Scout for $900.00 in cash over to McBoyle the night of my arrival at Galena.

"Q. You have been asked about going to Montana. What about that?

A. Well, afterwards, the latter part of December, I had contracted to work for McBoyle. It was a verbal contract up to January 1, 1927, and as the time approached for the length of the contract why I began to feel that things were getting pretty warm, and I felt that I could not stand to work for McBoyle any longer, and I went to McBoyle like a man and told him how I felt about it, and asked him if he would close up the deal and pay me off my commissions, and I would get loose. Mr. McBoyle got made and started to cuss me out terribly. He said, "You think you are going to leave here because you know a lot." He said, "I have got a hammer over the people there, and I can put you behind the bars any minute I want to, and if you do leave here keep your damn mouth shut and don't drop a word or I will have you behind the penitentiary bars where you will never get out." So, I left McBoyle and I felt the time had come for a reckoning and I went immediately to Chicago, and I called up Anderson at Richmond, Indiana, the man that owned the plane I had sold to Nelson, and I asked Nelson [Anderson] the truth about whether or not he had hi-jacked this plane from McBoyle. Anderson said, "No, sir, that plane is
68 mine, and I think I will sell it." He said, "My wife bought it for me. Do you know anything about it?"

Mr. Milroy: I move this conversation with Anderson be stricken out.

The Court: Sustained.

A. I found out that the plane was reported as a stolen plane so I immediately took—

Mr. Milroy: Objected to as being hearsay.

Mr. Wagoner: That is preliminary to what he did. He said he found out now it was stolen.

Mr. Milroy: We have no means of checking up that information. That is the trouble.

The Court: He said a moment ago that he heard it was a stolen plane. Objection sustained. It is hearsay.

A. I immediately went to Minneapolis, and notified Nelson about the condition and Nelson became frightened and he said—

Mr. Milroy: Objected to.

The Court: Sustained.

Mr. Wagoner: You can't state what he said.

A. I talked the matter over with Nelson, and we finally came to an agreement, Nelson and I that I was to fly the plane temporarily away from Minneapolis, and Nelson in turn was to get in touch with Anderson in order to make positive about the deal and to straighten it out in some manner, and Nelson wanted me to get the plane away from there tempo-
69 rarily at least until those things were straightened out so nobody could take the plane, so I flew it into Montana, and I was flying at the time of my arrest.

Q. You were arrested out there on a fugitive complaint?

A. Fugitive complaint in this action here.

Q. When was the first time you ever talked to me in regard to this matter and told your story, before you came here?

A. No, sir.

Q. You never saw me before?

A. No, sir.

Q. And you never were made any promises, were you, in regard to this matter?

A. Absolutely not.

Q. For your testimony?

A. No, sir.

Q. Or no threats?

A. Not a threat, no, sir.

Q. And no immunity was held out to you?

A. No, sir.

Mr. Milroy: I object to that line of questioning.

The Court: No, I don't think it is hardly proper.

Recross Examination.

By Mr. Milroy:

"Q. Now, when you say you learned that this Ander-
70 son plane as we may designate it was not hi-jacked

from McBoyle but was the property of Anderson, you went to Nelson and instead of getting that plane back for Anderson you took it away from Minnesota, is that right?

A. That was our intention to get it back to Nelson.

Q. Nelson asked you, according to your redirect examination, to take this plane away from Minneapolis?

A. Temporarily until he straightened the matter out.

Q. Did you have any other of these little jobs you did on the side?

A. No, sir.

Q. Did you ask Anderson whether you could take this plane or not?

A. Absolutely not.

Q. You didn't consider that stealing it, I don't suppose, did you?

A. No, sir, not at the time I didn't. I had full trust in Mr. McBoyle at the time.

Q. Did you know this man Anderson?

A. Not at all.

Q. How long had you known McBoyle up to that time?

A. I had known him slightly over a week.

Q. And he told you to go down to Indiana and get a plane, and you went down to get it without consulting the owner at all. Is that right?

A. Yes, sir, I did.

Q. And you didn't consider that stealing it?

A. Yes, it was stealing it.

71 Q. It was slightly reckless on your part.

A. It was very reckless.

Q. Was McBoyle indicted in Indiana for that?

A. Not to my knowledge.

Q. But you were, though, weren't you?

A. Yes, sir.

Q. You testified, I think, that you were in Ottawa about a week before this case came up here.

A. Yes, sir.

Q. What were you doing down there?

A. At the present time I am a partner and part owner of the Ottawa Aircraft Company.

Q. Did you go down there and consult Bridgeman about this case?

A. Absolutely not. I am in business down there. Bridgeman isn't there at Ottawa.

H. J. Neubauer testified on behalf of the Government as follows:

Direct Examination.

My name is H. J. Neubauer. I live at Hinkley, Illinois, have lived there 12 years. I am a licensed physician and surgeon in Illinois. I know McBoyle and Lacey. Have known Lacey since 1924; knew McBoyle in 1926. Hinkley is about 80 to 100 miles from where McBoyle and Lacey were living. Am one of the fellows mixed up in the air business over there; have an airplane and fly around over the country when I want to. Lacey worked for me in 1925 and part of 1926. When
72 he left in 1926 he went to work for McBoyle. He worked for McBoyle from the forepart of July until the latter part of December in the same year.

I had occasion to be at McBoyle's place sometime in the fall of 1926; I had a conversation with McBoyle in regard to hiring Lacey. I had been over to McBoyle's airport or to his place a couple of different times and he had been down to my place several times. At the time I have reference to I wanted to know how much money he was paying Lacey. He says, "I usually keep him so that he is broke", and the reason why I asked him the question was Mr. Lacey was financially obligated to me and I wanted to impress on my mind about how much he could pay back to me from the wages he was receiving. The second time he told me he was receiving $35.00 a week and 20 per cent commission. I tried to hire Lacey from McBoyle in November, 1926.

"Q. What was that conversation between you and McBoyle?

A. He wanted to know if I could have him as a pilot.

Q. What did he say to you?

A. He didn't say nothing other than state he was busy.

Q. Did you know where Lacey was working at the time you made this inquiry?

A. He was with him at the time, some."

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73 O. L. Clark testified on behalf of the Government as follows:

Direct Examination.

My name is O. L. Clark, I live at Guymon, Oklahoma, where I have lived for about 22 years. Have been sheriff and under sheriff of that county off and on since 1910. In 1926 I was under sheriff under Ben F. Reneke, who was sheriff at that time.

Along about the 10th of October an airplane stopped at our field. I saw the pilot. His name was Steve Lacey, he was flying a Waco. I was right on the highway when he landed. He was there for a couple of days.

"Q. Mr. Clark, during the time he was there, during those couple of days, did you see any telegrams that passed between him and anyone?

Mr. Milroy: That is objected to.

Q. I am not asking what they were.
A. Yes, sir.
Q. Where did you see them?
A. In the Rock Island, there at the depot.
Q. Do you know who they were from?

Mr. Milroy: That is objected to. The telegrams are the best evidence.

The Court: Sustained.

S. H. Gwin Testified on behalf of the Government as follows:

Direct Examination.

My name is S. H. Gwin, I live at Guymon, Oklahoma.
74 Have lived there 19 years. Am a telegrapher, work for the Rock Island, but handle Western Union business besides. I was telegrapher in October, 1926. I know a plane landed at Guymon, but could not say about the date. A fair was going on. I saw who they said was the pilot. I see him here. I think Mr. Lacey is the pilot.

"Q. Did Mr. Lacey, the man whom you have seen here, send any telegrams while he was there?
A. He sent messages under another name, Pat Sullivan.
Q. He did send some then?
A. Yes, sir.
Q. Do you recall to what town or city in the United States that he directed the telegrams to that he sent?

Mr. Milroy: Object to that as not being the best evidence, and no foundation laid for the introduction of this secondary evidence.

The Court: If you have an independent recollection you may answer. The telegram would be the best evidence.

A. Galena, is where they went to.

Q. Do you have an independent recollection as to the name of the person to whom they were sent?

Mr. Milroy: Objected to for the same reason.

Mr. Wagoner: I am laying the foundation. I think the evidence is proper if he remembers.

75 The Court: He may answer.

Mr. Milroy: Exception.

A. Mr. McBoyle is who they went to.

Q. Have you the original telegrams that were sent by Pat Sullivan, as testified by you, or received by Pat Sullivan?

A. I have not.

Q. What is the custom of the Western Union as to the length of time those telegrams are held?

A. They are destroyed after one year.

Q. Do you know whether the telegrams you have testified about have been destroyed.

A. Yes, they have been destroyed.

Q. You may state whether or not that before those telegrams were destroyed that you made copies of the originals.

A. Yes, I had a court order to furnish the copies and I did so.

Q. Do you recall now any of the contents of those telegrams that were sent by Sullivan, without stating what it was?

A. I don't think so. If I could see the messages over I might be able to recall some of them.

Q. I hand you Government's Exhibit No. 1 and ask you to examine that and refresh your memory as to whether the contents of that instrument were in the original telegrams that were sent?

A. I can't say positive, but I can recall some of the wording.

76 Q. Do you recall part of the telegram as the one that was sent?

A. Yes.

Q. What part of it, that is, to what extent, just a few words or a great percent of it?

Mr. Milroy: If the Court please, at this time I desire to move that all of the answers of this witness, the first question concerning these telegrams be excluded, and the jury instructed to disregard them for the reason that when this copy or alleged copy was made, the originals were available to the Government of the United States, and by failing to produce the originals that they should have produced when this copy was made, they haven't complied with the rules regarding the best evidence.

The Court: Overruled.

Mr. Milroy: Exception.

The Court: Did you make this copy from the original?

A. I did not, no, sir.

Q. Do you know who did make it, if anybody?

A. The County Attorney made copies. That is, his stenographer made copies of the originals.

Mr. Milroy: I wish to renew the motion.

The Court: Sustained.

Mr. Wagoner: Take the witness.

Mr. Milroy: No cross examination.

77 Mr. Wagoner: That is all.

Ben F. Rarick testified on behalf of the Government as follows:

Direct Examination.

My name is Ben F. Rarick, I live at Guymon, Texas County, Oklahoma, have lived there about 23 years. Am postmaster. Was sheriff before that for five years; was sheriff in October, 1926. Have seen Steve Lacey since I have been in this court. There was an airplane at Guymon in October, 1926, around the 10th up to the 20th. I visited the plane; It was a Waco plane. I examined the plane for serial number. I found where the number had been filed and changed. I do not recall the number.

Cross-Examination.

When I looked at the serial number I noticed that the numbers were stamped. The metal for the stamp looked as

though it had been filed. I could not say how deep the figures were. The piece of metal was not a very large piece. I suppose it was as thick as your finger, maybe. It had been repainted over and this paint was not exactly the same color. The fitting where this number was had been filed smooth and stamped over. I couldn't remember the number now. It seems to me there was another number some place. The numbers were not all the same. I don't remember how many numbers there were. Just one number that I saw was filed.

Mr. Wagoner: The Government rests.

Mr. Milroy: At the conclusion of the Government's
78 case, the defendant desires to enter a motion that the jury be instructed to find for the defendant on a plea of not Guilty, and there is some little argument we wish to offer in support of that motion.

The Court: Gentlemen of the jury, you may be excused until 9:30 o'clock tomorrow morning.

(Thereupon, the jury was given the usual admonition by the Court and court adjourned until 9:30 o'clock A. M., May 25, 1929, and after the jury was excused and before the formal adjournment of court, the motion of the defendant was argued to the Court, after which the same was overruled, to which the defendant excepted.)

May 25, 1929.

Thereupon Mr. Milroy made the opening statement to the jury on behalf of the defendant.

Harold L. Mathey testified on behalf of the defendant as follows:

Direct Examination.

My name is Harold L. Mathey, I live at Dubuque, Iowa, where I am in the Chevrolet sales and service, at Dubuque and Galena. Have been at Dubuque something over two years. Have known McBoyle five years within a few months. Knew him at Galena and since I have been at Dubuque.

79 "Q. Do you know Mr. McBoyle's reputation for honesty and integrity in the community in which he resides?

Mr. Wagoner: Object to the question as not in proper form.

The Court: Overruled.

A. Yes, sir.

Q. What is that reputation?

A. Good.

Q. Do you know anything about the circumstances under which Mr. McBoyle came to be connected with the Dubuque airport?

A. Yes, sir.

Mr. St. Lewis: We object to that if the court please, as incompetent, irrelevant and immaterial.

The Court: Sustained.

(After argument the objection is withdrawn.)

Q. Just go ahead and relate that transaction.

A. I was appointed on the airport aviation committee of the Chamber of Commerce and the purpose of the committee was to establish an airport in Dubuque. We had none at the time. We advertised this and several applications were received for the managership and equipment for this airport. It was a municipal airport, and we took the matter quite seriously, and a sub-committee was appointed to investigate these applications and I was on that committee. In the course of this investigation McBoyle's application seemed the best for financial reasons, the best equipment. A question arose as to McBoyle's fitness on account of this
80 case that was pending and we took this into consideration....

Q. Which case is that, this one you mean?

A. Yes, sir. We took this into consideration, and of course, we couldn't go to trial on that matter, with the information that we had, newspaper information and general information of the case and knowledge of Lacey's character, we couldn't but accept McBoyle as the proper man to operate this airport. Our recommendations were received by the committee in general, approved by the Chamber of Commerce, and McBoyle was accepted and made manager and operator of the Dubuque airport.

Q. Still operates it doesn't he?

A. Yes, sir.

Cross-Examination by Mr. St. Lewis.

Q. You made a rather thorough investigation of this man, did you?

A. Yes, sir.

Q. Did you investigate what he was doing in Montana in 1924?

Mr. Milroy: Objected to as not proper cross examination.

The Court: Overruled.

Mr. Milroy; Exception.

Q. (By Mr. St. Lewis) Answer.

A. No, sir.

Q. Did you investigate that he was indicted at Chicago for stealing a Cadillac car in 1924?

A. No, sir.

Q. You didn't find that out?

A. No, sir.

81 Q. Did you investigate that he was under investigation for the theft of a Wyllis-Sinclair [Wills-St. Claire] roadster which was sold to a bootlegger at Appleton, Wisconsin?

A. We didn't. I have no knowledge of that.

Mr. Brown: We object to the form of those questions as assuming a fact not proven.

The Court: I thought this question ought not to have been gone into.

Mr. St. Lewis: No.

The Court: And was ready to rule on that, but you asked the question now and this witness has placed himself in the position as having investigated the reputation and character of this man, and testifies as a result of his investigation that this man's reputation was good. Now I think that opens it up to general cross examination. Overruled.

Mr. Brown: Exception.

Mr. Milroy: I think it does, if the Court please. I just want to make this suggestion. Counsel is couching these questions in a manner that assumes the truth of the statements. In other words, assumes the truth of these charges. I think counsel should, in justice to this man, and in justice

to the jury and court, have some authentic information to base these questions upon.

82 Mr. St. Lewis: I can't try those cases.

Mr. Milroy: You can produce your facts.

The Court: The court will instruct the jury not to consider any evidence and reference to any former offense or alleged defense against the defendant unless the Government later offers some evidence to support that allegation.

Q. (By Mr. St. Lewis) You say you didn't investigate those matters?

A. No, sir, we knew nothing of them.

Q. Did you investigate as to all of his business activities there at Galena?

A. Insofar as we were able, yes, sir.

Q. You lived at Galena, didn't you, for a while?

A. Yes, sir, practically all my life.

Q. Were you associated with him?

A. Was I associated with him in business?

Q. Did you do any flying for him there on his field?

A. Yes, sir.

Q. And you went to Dubuque when he went up there, didn't you?

A. No, sir, I preceded him.

Q. A little before that?

A. Yes, sir.

Q. So you have been associated with him for a number of years, haven't you?

A. Yes, I have known him, I have been and about his field and about his operations and about his business
83 places with him.

Q. This man Anderson that lives at Richmond, Indiana, you knew him too, didn't you?

A. No, sir.

Q. Did you know his business?

A. No, sir, I don't.

Q. He was killed at Sandusky, wasn't he?

A. I don't know.

Mr. Milroy: I don't think Mr. Anderson's character is involved.

Mr. St. Lewis: Counsel brought that Richmond matter up.

Mr. Milroy: It is not proper cross examination. I am objecting to that as not proper cross examination.

The Court: Overruled.

Mr. Milroy: Exception.

Q. (By Mr. St. Lewis) You didn't know that man?

A. No, sir.

Q. You didn't know Mr. McBoyle sent Mr. Lacey over there to get that airplane from Anderson, telling him that he had been hi-jacked when he had a load of whiskey, do you?

A. No, sir.

Q. Did you investigate that?

A. No, sir.

Q. That is all.

Re-Direct Examination.

84 By Mr. Milroy:

Q. As a matter of fact, you investigated everything that you could find out about this man's character and reputation and business ability?

A. Yes, sir, we didn't put him on trial. Everything we knew we took into consideration, but we didn't put the man on trial. We didn't send detectives out. We got all the information that was available.

Recross Examination.

By Mr. St. Lewis:

Q. How long were you over there at Dubuque before Mr. McBoyle followed?

Mr. Milroy: Objected to as to form. He assumes there is some connection.

The Court: Yes, the form of the question is objectionable.

Q. Did you go to Dubuque before McBoyle?

A. Yes, sir.

Q. How long before?

A I went in there the first of the year. I believe the 4th of January in 1927. Mr. McBoyle opened up the airport early in the spring of 1928.

Q. You were the promoter of that airport over there, weren't you?

A. No, sir.

Q. You were not the promoter of that?

A. No, sir. I had no financial interest in the airport.

85 Q. But you didn't investigate the theft of this plane at Richmond on July 12, 1926?

Mr. Milroy: Objected to as incompetent, irrelevant and immaterial and improper cross examination.

The Court: Overruled.

Mr. Milroy: Exception.

Q. You didn't investigate the theft of the Anderson plane at Richmond, Indiana, on July 12, 1926, did you?

A. No, sir.

Q. You knew about it, didn't you?

A. No, sir.

Evidence of Defendant.

William McBoyle, the defendant, testified as follows:

My name is William McBoyle, I live at Dubuque, Iowa, where I have been living a little over a year. Prior to that time I lived at Galena, Illinois; lived at Galena since 1914. Am a married man, have one boy. My business at present is operator and owner of an airport at Dubuque, Iowa. I ran a garage and airport at Galena, Illinois. I am a licensed pilot; have a license from the Department of Commerce.

I am acquainted with Mr. Lacey. First met him about the middle of June, 1926, at my airport at Galena, Illinois. He came in with a Thomas-Morris Scout or Yackey airplane;

86 I had some conversation with him. Lacey introduced himself to me, told me where he was from; said he understood that I was interested in a pilot. I told him that I was not and just talked about generalities and the business in that part of the country. I was considering the question of having a pilot; I told him that I did not care to hire a man to fly unless I knew him better. He was there possibly an hour or an hour and a half. He then left.

I saw him again the first of July or last of June, just previous to the Fourth of July. Saw him at my airport in Galena. He came in an airplane something similar to the one he had been there previously with. The only thing I recall about that plane was that it had a name on it of Hinkley, Illinois, William J. Neubauer, or something that connected the plane with the Neubauer establishment at Hinkley. There was some conversation between us.

"A. Mr. Lacey had looked my ships over the day he was there. The hangar was wide open and he looked them over. He noticed that I had a big four Standard airplane which he was very much in love with and wanted to fly it. He remarked that day that if he had a plane like that at Sheridan, Illinois, he could make some engagements with it on some engagement that was to come up there around the first or second of July, and thought he could make himself four or five hundred dollars and wanted to know how I would work it and I considered it quite seriously, and I had him fly for me to see if he could handle a machine, and he flew very nicely and there were other parties there and we all commented on his ability
87 to fly. Then we got the Standard out and warmed it up and he took it up and tested it and approved of it and we thought it would be all right. We made an agreement that he would take the machine down there for the second or third. I am not sure whether it was the first or second, but about those dates. Anyway, the engagement I had was at Shells Park and that was a very important engagement I had signed up for frequently, and in those cases if you fail to appear you have to forfeit $50 a day, and it was the 3rd and 4th of July I was supposed to put in an appearance. I was not able to fill those dates myself very successfully at that time, and I said he could go down with that machine to Sheridan, Illinois, and fill that date, and probably make himself and myself some money, and I would let him do it, provided he would come back and fill the date in Shells Park, Wisconsin.

Q. What, if any, business arrangement was there between you and Lacey?

A. At that time and that date that is all the business arrangements made at that time, that he was to take the machine, and take care of it, supply it with gas and oil, take out his hotel expenses, work the machine and return and split 50 per cent of the net. He was to take 50 per cent of the net proceeds, and I was to take 50 per cent after the expenses were paid for the trip, and he was expected to return the next day.

Q. Was that all the conversation?

A. Practically all I can remember. There might have
88 been other details in regard to taking care of the plane, an so on."

He left then, flew away. He came back to my airport the following morning; I think on the train or automobile, I am not positive which. I had a conversation with him. The proposition had been worked out. He had taken the machine down

and cracked it very seriously. He told me it was a mild affair with the Standard Oil Company.

"Q. At that time had he already taken the machine down somewhere?

A. Yes. He had taken it to Sheridan, Illinois.

Q. When did he take it?

A. I think July first.

Q. This was when?

A. This was the next day sometime possibly in the forenoon. I don't exactly remember. It was quite awhile ago. It was following or as soon as he could start from Sheridan. He cracked the machine on the second or third trip he was flying at Sheridan.

Q. Did you consider at that time you had business arrangements with him from then on?

A. I did not. The only business arrangements I had with him from then on was the idea of fixing the machine up. I was holding the sack for possibly a seventeen or eighteen hundred dollar machine. I didn't see the smash up. He told me it was terrible and I had no way of judging the damage, and furthermore I was at a loss to fill the dates at Shells Park, Wisconsin which I was under contract for there, and July 4th is a very busy time of the year, from then on.

89 "Q. Was there any further conversation at that time relative to any further activities?

A. There was. After the thing was settled in regard to taking care of this machine he was very sorry and had a lot of alibies, and wanted me to handle this suit. I told him I was not interested in suing the Standard Oil Company. I said, "I have got good reasons; you sue them. Pay me for the plane and take the balance yourself." I think a suit was instituted. Maybe it was withdrawn down in that country against the Standard Oil Company.

Q. That is immaterial. Was there any further conversation?

A. He said he had a machine in Niles, Michigan; but he was tied up because he had some trouble with his wife. I have forgotten exactly about the trouble, but anyway, I understand it was through an alimony deal of some kind. She had his machine tied up.

Q. Did he tell you this?

A. Yes, he did.

Q. What further was said?

A. He said he couldn't get his machine right away, but if

I would give him time he would get the machine fixed up. He wanted to go back and fix things up with his wife. Wanted my car to drive over and see her.

Q. What did he want his machine for?

A. To fill those engagements, he was already obligated to fill at my field but had broke my ship.

90 Q. Were those engagements he made contracts for or you?

A. He hadn't made any engagements for me. The engagements were engagements I had made through the mail and personal contacts at previous times.

Q. What if any business arrangements did you have with Lacey covering these flying trips?

A. I had no business arrangements at that time only this fifty per cent deal we were supposed to work out at Sheridan. That was all.

Q. Did he leave then?

A. He left in a few days after that. He hung around there. He wanted to fly my other ships. I said he cracked one and that was enough.

Q. When did you ever see him again?

A. I wouldn't know the date now. I couldn't recall it exactly, but it was possibly two weeks after that.

Q. Where did you see him?

A. He came to Galena.

Q. Galena airport?

A. Yes, sir.

Q. By what means of transportation?

A. He had a Waco Nine airplane.

Q. What happened? Was there any conversation then at that time?

A. Yes, he said he had been over in Michigan and got things straightened up with his wife and wanted to know if he could fill—wanted to know about certain dates we
91 had passed over, a general conversation about what dates I had to fill and wanted to know if we could make some arrangement to fill those dates, and flying off the field with his machine.

Q. Was this Waco-nine, did that later develop to be the Anderson plane?

A. As far as I know it did.

Q. Did you have any arrangements with him relative to filling in these dates?

A. Yes, he said if I would give him a chance to fill in the dates he would get the standard back and he would fix it up for me. If I would give him a chance to fly off of the field. I was sick at that time, which later resulted in an operation, so I let him fly off the field. The agreement, as I remember it, was he was to receive 20 per cent of the passenger or taxi trips that came directly to the field in my name. In other words, any business he did was on his own but he was supposed to buy his gas and oil and pay a certain amount for storage.

Q. Did you ever at any time during the time that you first saw him at the time that you left Galena and all these business arrangements, did you ever during this time pay him $35 a week?

A. I never paid him $35 as a salary.

Q. When did he terminate or you terminate or was this arrangement ever terminated between you and Lacey?

A. Yes.

Q. Approximately when?

A. Well, that is going to be hard for me to specify
92 the exact date. He operated there for a few weeks. I wouldn't say, a few weeks, might be three or four under that condition. He was gone most of the time. Possibly he would be there on Sundays.

Q. Was there any particular occasion when you severed your connection?

A. Well, in the meantime he had gotten his wife from Buchanan, Michigan, and brought her to Galena, and being short of funds and embarrassed as he said he was, I gave him the privilege of staying at my house, and he and her stayed there and naturally it become—well, family trouble set it [in]. There were too many in the house, I guess, and slightly imposed on my wife and things developed there that were not satisfactory, so I told him he better go or take his wife back and get the hell out of there. Those are the words I said and we had a row about it.

Q. Well, did he make any reply to that or anything of the kind?

A. No. He said he would take her. He said his home was in Minneapolis and he would take her to Minneapolis.

Q. Was that the terminus?

A. That was the terminus as far as I knew at that time, yes.

Q. Was he around your airport around October 6th, 1927?

A. Yes. He came into my airport, and I wouldn't say whether it was October 5th or 6th of 1927.

93 Q. 1926?

A. 1926, yes.

Q. Was there any conversation there at that time?

A. Yes, sir.

Q. Between you and Mr. Lacey?

A. Yes.

Q. What was the conversation?

A. Well, he had left my place in kind of a bad mood. I had been insisting that he fix up my standard but he had gone to Minneapolis and had come back there on his way back, and had got his car and gone, and so in that conversation at this time previous to when he came back he told me he would not work as a grease monkey, that he was a flier, first class. I said that is very fine but I would lke to see him get a job flying.

Q. What else, if anything, did he say?

A. At what time?

Q. At that time.

A. When he come in this morning?

Q. No, when he came in there and said he was going to leave you.

A. He frankly stated that he didn't have to work in my airport, and we agreed on that. I said you can possibly get another job. There was no question about it.

Q. Did he answer you?

A. Yes. He said he had lived before he saw me and I said I sure as hell lived before I saw him and didn't need him around there.

94 Q. Was that October 5th or October 6th, about in there?

A. Yes, this was a little previous to that.

Q. On October 5th or 6th did he leave then, did he say where he was going?

A. No, on October 5th or 6th as well as I can remember, he came in with another airplane.

Q. Came in with another airplane?

A. Yes.

Q. On October 5th or 6th?

A. Well, yes, one or the other.

Q. What kind of an airplane did he come in with then?

A. A Waco-nine airplane.

Q. What time of the day did he come in?

A. Well, I couldn't say exactly. It was sometime in the forenoon or morning. I judge around nine or nine-thirty.

Q. When he came in, did you see him come in?

A. I didn't see him come in, no.

Q. Did you see him land?

A. No, I didn't.

Q. When did you first see him?

A. I was just getting up, my wife and boy had said there was an airplane landed and I was up and putting on my clothes and he walked in at the little camp we had at the field. We used to stay there at night.

Q. What, if anything, did he say or did you say to him?

95 A. Well, I said, "You are out early" or something like that. "Where in the dickens did you come from?" He smiled and said he was, and he was invited to have a cup of coffee, so I asked him what he was doing and he said he was working with Mr. Bridgeman at Ottawa, working for the Ottawa Aeroplane Company or an Ottawa firm or something like that.

Q. What, if anything else, was said?

A. O, I don't know. I spoke to him to some extent about his job and his connection, what it was like, and he said he had arrangements with Mr. Bridgeman that he could take the plane out and barn-storm it as it is called. By that he meant, I presume, the term barn-storming was for a pilot to take a plane out and get a certain per cent of what he made with the plane. He said he had an agreement with him and he spoke to me about the possibility of making a little side money on carrying some liquor that he thought was being transported around in that territory. I said that was a matter for him to think of. I don't know as I went into it very strong, and he asked about certain parties to get in contact with and called one of them up on the phone.

Q. Called one of them up?

A. He called one of them up on the phone in regard to some business.

Q. That is for the purpose of buying or selling or transporting of what?

A. Well, I wouldn't say what it was. A deal had been pending. I had heard of it, a fellow in McGregor,
96 Iowa, that had wanted to have some stuff, and he had

been down there and wanted to get some. I think it was alcohol to take back and we had directed him where we thought he could get it, and then he decided he didn't want to carry it back in the car because he would have to cross the high-bridge, and the supposition was some of us would be coming up there in a few days. Mr. Lacey talked about it and agreed to take it up to him, so this morning in the conversation he wanted to know if I had ever taken that stuff to McGregor, Iowa, and I said no, and I got him in connection with the man he wanted to get in connection with.

Q. What did he say or what happened after that?

A. Well, he told the boys, his mechanic was there, the one that had been working on my plane for the last day or two, and some of my mechanics and my bookkeeper were there and he told them to gas the plane up and get it ready and that was all that I remember. The plane was gassed and serviced and he paid for the gas and oil.

Q. Was that all that was placed in the plane?

A. No, it wasn't.

A. What else?

A. After he placed his package, he had an old coat that had been left there in the hangar. He had that picked up and he had some packages put out of the car and presumed to be booze and put in the plane.

Q. Where was it placed in the plane, do you remember?

97 A. In the front cock-pit.

Q. Then how long was he at the airport?

A. Oh, I would judge half or three-quarters of an hour.

Q. Did he pay for this gasoline he bought?

A. Yes, sir, he did.

Q. Did he say where he was going?

A. He said he was going to McGregor, Iowa.

Q. And the reason he was going up there was to do what?

A. Well, he had a deal. I didn't know a great deal about that, but he had a deal up there where he was to get a deposit, a certain amount of money. I think the down payment was $150 from the student to learn to fly. That was his deal, and if he taught and trained him around my field I was to get a percent of that.

Q. Then he went up to see about that and he was supposed to fix it—

A. And he had taken this stuff which this man or his associates—

Q. When, if ever, did you ever hear from him again?

A. The next time I heard from Mr. Lacey was about—late that same evening.

Q. October 10th or 11th, 1927?

A. No, it was previous to that. I wouldn't say that night or the next night, the following night, but it was either the first or second night following that night he was there
98 which I presume would be about October 6th, or the morning, rather.

Q. Where did you hear from him and how?

A. I got a telephone call from some little town in Missouri.

Q. Can you relate the conversation that you had?

A. Some of it I can. He says, "Mac, I have been to McGregor and I didn't want to land in that field, the old man and everybody was around there and I didn't want to leave that stuff there." He said, "what will I do with it?" I said, "I don't know. What in the devil are you doing down there, where are you now?" and I can't remember the town, but it was somewhere near Keokuk, Iowa, but it was over in Missouri, I am not familiar with just how close that is, but somewhere in Missouri. I remember the Missouri part of it. I said, "Bridgeman called you" and he said, "I have talked to Bridgeman," and he said, "What in the hell am I going to do with this stuff?" He said, "I couldn't deliver it to McGregor on account of Welch's old man being out there on the field." I said, "As far as I know, take it over, I have some friends in Keokuk." He knew them. He had been there before. I says, "Take it over there and if you can't take it there bring it home."

Q. Did you say anything further?

A. I told him that Bridgeman had called up. He said he would take care of Bridgeman, that he would call Bridgeman himself.

Q. Did Bridgeman call you up?

A. Bridgeman had called me up later in the day. I
99 think it was about four or five o'clock the next day that Lacey was there with the plane, and he asked me if Mr. Lacey was there. I said he wasn't there at that time. I said he had gone on to McGregor, because that was part of the conversation we entered into that morning. He told me if Bridgeman called him to tell him he had gone to McGregor on that plane deal. I remember that.

Q. After this telephone call in Missouri, did you hear from Mr. Lacey after that again?

A. Yes, I did.

Q. How long afterwards?

A. Well, possibly three or four days.

Q. How did you hear from him, in what way?

A. As near as I can remember I got a telegram.

Q. Where did you get the telegram from?

A. I think it was from Guymon, Oklahoma.

Q. Do you recall what was in that telegram?

A. No, I can't recall the specific words.

Q. Do you remember the substance of it?

A. He conveyed the idea to me that he was in danger with this stuff in the plane.

Q. What, if anything, did you do after you received that telegram?

A. I think I answered it.

Q. You did answer it?

A. Yes, sir.

Q. What did you tell him in your answer that you recall, if you remember, in substance?

100 A. The substance of it was to get rid of the stuff and get it out of his plane and get home.

Q. Did you at that time know anything about the fact that this plane was stolen?

A. No, I did not.

Q. How soon after that did you find out it was stolen?

A. Possibly an hour or so after I talked to Mr. Lacey I got a telephone call from Mr. Bridgeman.

Q. After you wired to Guymon, Oklahoma?

A. I did.

Q. You got a telephone call from Mr. Bridgeman?

A. Yes, sir, he called me several times asking for Lacey.

Q. Had he mentioned anything about the plane being stolen?

A. No, sir, not at that time he didn't.

Q. On this date after you had sent this wire to Guymon, Oklahoma, to Mr. Lacey telling him to come back and dispose of this stuff, did you hear further from Mr. Bridgeman, by telephone?

A. Yes, sir.

Q. Will you state the conversation you had over the telephone at that time?

A. Mr. Bridgeman says, "Say, Mac, where is that Lacey

anyway?'' I said, Bridgeman, I guess you know about as much about him as I do,'' just like that, because Lacey was not working with me, was not associated with me in any way, any time—

101 Q. Only outside of this?

A. That is all. I understood he was associated with Bridgeman. Lacey told me he had wired Bridgeman two or three times so in the conversation Bridgeman told me, he says, ''Some son-of-a-gun has stolen my plane and I think it is Lacey.'' I says, ''I want to see that fellow.'' He says, ''If he comes in there send him down because I am in a dickens of a boat down here.''

Q. Did you convey that message to Mr. Lacey?

A. In part I did.

Q. After that transpired did you hear from or see Mr. Lacey after the telegram at Guymon, Oklahoma?

A. Yes. Some few days after that he came to my port, or met me in Galena. I wouldn't say whether he was at the field.

Q. It was either at Galena or at the airport?

A. Yes, sir.

Q. That is right close by Galena?

A. Yes, sir, about three miles north of Galena.

Q. Was there any conversation between you and Mr. Lacey at that time?

A. Yes, sir.

Q. What did you say?

A. I said, ''What in the dickens is going on between you and Bridgeman? What is Bridgeman trying to do? He has been calling me up every day.'' He said, ''I have had a dickens of a time with that stuff, and he was passing
102 the buck back to me in getting in trouble with this booze and didn't want me to get into trouble.'' I said, ''The best thing you can do is call up that sucker in Ottawa and get things straightened out because I am not going to be sitting in between here,'' and I think he called him up and the gist of the conversation I think resulted in Mr. Lacey making an arrangement to go down to Ottawa to see Bridgeman.

Q. Did he go down?

A. He did.

Q. Did he come back?

A. He did.

Q. Did he say anything to you after he came back?

A. He said he straightened things up for Bridgeman down there and everything was all right.

Q. Did he say he had stolen the plane?

A. He said he had not stolen the plane.

Q. What did he say about the arrangements?

A. He said he and Bridgeman had an arrangement and a few of the stockholders didn't understand it, and Bridgeman didn't explain it, but they were raising the deuce about it, and he went down and straightened it out with Bridgeman and everything was agreeable.

Q. Did he at that time tell you where this plane was?

A. He said it was somewhere in Missouri, somewhere down near Keokuk.

Q. After he came back from Bridgeman to your place and told you that everything was satisfactory what
103 happened after that?

A. He wanted to go to McGregor and close up that deal and get that student inasmuch as it had been pending, and the student had been calling up several times for Mr. Lacey, so after a little talk I gave him the plane to fly to McGregor. McGregor is a short distance north of there.

Q. Did he at that time close the deal?

A. No, he didn't.

Q. Did he go to McGregor?

A. I don't think he did.

Q. What was next done, when did you next hear from him or see him or what happened?

A. Well, the next thing that I heard, you mean after I heard from him?

Q. Yes, from Lacey.

A. The next thing I heard from Mr. Lacey was a day or two after that. I got a telegram of some kind from, I think it was Kansas City, or somewhere in Kansas, but it read something like this: "Send twenty dollars, urgent."

Q. Did you send him twenty dollars?

A. I considered it for a while. I don't know whether the demand was for twenty dollars or more now. I figured out, and didn't send it immediately, and he followed the telegram with a telephone call.

Q. What did he say in the telephone call, if anything?

104 A. He said he had started down to get that stuff, and that he had had trouble with the plane, had some

broken water lines, and one thing and another, and he was out of money, didn't have enough money and wanted to get some parts for the plane and get straightened out.

Q. What did you say?

A. I told him to get the plane straightened out and get on home, get rid of it. I was anxious to get the plane and bawl him out for being away. Told him he was supposed to go to McGregor. I don't remember the details of the conversation. They were not loving anyway.

Q. Did he come back?

A. In a few days.

Q. Did he have your plane when he came back?

A. He did not.

Q. Did you know where your plane was?

A. I did not.

Q. Did you find out where your plane was?

A. Right around that time or a few days after, I can't specify just exactly the date, I got a wire from the officer in Kansas somewhere I think it was, either the sheriff or deputy sheriff or something like that.

Q. Was Inman, Kansas, around in there?

A. Very likely around in there. I wouldn't remember the town.

Q. What was said in that telegram or telephone call?

A. He asked me if a certain Waco light plane with Mac on the side of it was my plane. The plane was also identified by my name being on it in other places in large letters.

105 Q. After he came back from Kansas City then was there any conversation between you and Lacey, after he came back from Kansas City and that ship was found was there any conversation between you?

A. You bet, lots of conversation.

Q. What did you say to him and what did he say to you?

A. Well, it might be kind of a long story, the question of his connection with Bridgeman and what had happened and what it was all about entered into the discussion.

Q. State what he said about Bridgeman.

A. He said Bridgeman was—I will have to find other words—

Q. What did he say to him?

A. He said the son-of-a-gun was yellow, had made a deal with him and was trying to make a goat out of him and he would be God derned if he would stand for letting Bridgeman

make a goat out of him. I said, "That is between you and Bridgeman and get down there and square things up with Bridgeman or get me out of it because Bridgeman is calling up here every day or two wanting to know where you are.

Q. Was that the first trip or second trip?

A. That was the first trip.

Q. When he came back the last time?

A. Yes, sir.

Q. Did you have another conversation with him, did you ask him about your machine out there in Inman?

A. Sure.

106 Q. What did you ask him, what happened down there, what did he say, how did he explain that?

A. He said he had gone there for the stuff, and he had gone to some hotel. I can't think what the name of it was now, but when he went in there there was three or four dicks there and he thought the best thing he could do was to get out.

Q. Did he say why he went down to Guymon, Oklahoma?

A. On this stuff.

Q. Did he say anything else?

A. Yes, he said he was going down there to get—

Q. Did he say anything at all about what was the reason for going down there with your ship?

A. It was to get this stuff as he developed to me.

Q. Which stuff, you mean the alcohol?

A. Yes. That was down in some town in Missouri.

Q. And when he came back, what happened, you had this conversation.

A. When he came back we got into it pretty thick and fast about my ship, and in the meantime when he had come back I got the telegram or notification about the ship being somewhere in Kansas instead of Missouri, and I demanded an explanation of that, and he got fussed up and one thing and another and then he told me quite a bit of happenings in his life.

Q. What did he say to you?

107 A. Well, he told me he had stolen several ships.

Q. Did he say that he stole this particular ship?

A. He said, "I had an agreement with Bridgeman on this particular ship." He says, "I can straighten that out if I can go down to Ottawa."

Q. Was anything else said at that time?

A. I don't remember all the details.

Q. What did you tell him?

A. I told him the best thing he could do was to go down and get things straightened out with Bridgeman.

Q. What happened to him in the meantime, did he go down to Bridgeman or did he leave?

A. Yes. He was pretty dirty and didn't have many clothes. He said he didn't have any money and didn't want to make his appearance down to Bridgeman's like that, didn't have any way of going down, so we talked things over for quite a while and I said finish up this deal in McGregor, go down there and see Bridgeman and then come back up and finish it, that deal in McGregor.

Q. Did he do that?

A. Mr. Bridgeman, by the way, had been calling me several times to have Mr. Lacey come down there when he came in.

Q. Was this after the first trip or second?

A. Well, the second trip, so I was anxious on my part to get Mr. Lacey and Mr. Bridgeman together, and I know
108 Mr. Bridgeman and I thought if there was anything wrong they could fix it up.

Q. Did you know at any time prior to this time this plane was found at Guymon, Oklahoma, did you know Lacey had taken this ship wrongfully?

A. I did not know that he had stolen the ship.

Q. When you found it out you told him to come back and in the meantime you sent him down to Bridgeman to straighten this up. What was the reason, why were you interested?

A. Because I had told Bridgeman on the first day he had called or the first time he had called as Lacey had directed me to tell him.

Q. Was there any other reason?

A. I had made myself out as far as Lacey is concerned, I made myself out a liar to Bridgeman.

Q. Was there any other reason why you wanted this ship to come back?

A. I didn't want him running around with my stuff in the ship.

Q. Did you ever go down and see Bridgeman about this matter?

A. I later did.

Q. What happened when you got down there? Did anything happen when you went down to see Bridgeman?

A. No, not in particular. I went down at Lacey's instigation later on and put in a plea for Mr. Bridgeman as Lacey requested me to.

109. Q. Did they fix you up at that time?

A. No, sir.

Q. When were you fixed up, arrested?

A. I wouldn't state exactly the date. I was flying down through Monmouth, Illinois, and on landing there why the sheriff had known of my coming or the airport had known of my coming and he was there to meet me. He said he had a telegram or communication from Ottawa, Illinois, that I had the stolen airplane and he had to hold me. I said, "Let's get in the plane if that is the case and go to Ottawa." It was possibly a hundred or a hundred and fifty miles from there and he objected to going in the plane so finally I prevailed upon him to deputize a man. The idea was to hold me there in Monmouth.

Q. Just state what happened.

A. Well, he deputized a flier there as deputy sheriff and had him accompany me in the flying machine over to Ottawa. When I got to Ottawa, they had phoned I was coming by airplane, we waited on the field for fifteen or twenty minutes or half an hour and nobody showed up, so I told Mr. Langston, he was the man that took me over, that I would go down and look the manager of the port up at Monmouth. He says, "I am a deputy and I guess I will have to go with you, Mac" and he landed and we both went down, went to the jail and told them who we were.

Q. Did they lock you up?

A. Told me to sit down there in the door.

Q. What happened then?

110 A. I sat there fifteen minutes. Nobody seemed to know what it was about or anything so I think it was just about meal time or supper time, something like that.

Q. Did you see anybody there?

A. Nobody at all except just one fellow that was just kind of a deputy sheriff, and I said, "You better take care of me." He says, "Well, if I take care of you I have got to put you in here. It is supper time." So he put me in the jail room, in with some other fellows there, and I was in there ten or fifteen minutes and Mr. Bridgeman and some of his associates showed up.

Q. What, if anything, took place then?

A. And they looked at me and kind of grinned and smiled

and says, "Jesus Christ, Mac, what are you doing in here?" I says, "I don't just exactly know. You ought to know more about that." And the conversation was carried on. He says, "What can we do for you? How can we get you out of this?" I said, "You got me into it. It would be a good suggestion for you to get me out." We joked and kidded back and forth. Pretty soon he said, "Come out here, I want to talk to you", so I think he had the District Attorney or some judge, I don't know who the fellow was, but I assumed he was some officer.

Q. Did you have a later hearing?

A. No, we just went out in the jail room and talked it over. Now he says, "What do you mean by this telegram? The telegram referred to the sale of stock. He says, "Are you trying to sell my plane?" I says, "Bridgeman, I am
111 with you. You know something about the conversation you had with me. Wasn't Lacey working for you," and so on. He says, "This looks kind of bad to the fellows around here." Well, I says, "I will tell you" and I told him what happened to the proposition at that time by my reference to this telegram, and other matters were talked over and the circumstances surrounding the loss of their plane.

Q. This was a telegram you are talking about that came from Guymon, Oklahoma, or you sent to Guymon, Oklahoma, to Lacey?

A. Yes, sir, it was.

Q. That was discussed. What happened then after that?

A. Everything was discussed and conditions were discussed about the points of calling me, what he had told me. Bridgeman, I believe, had conveyed the idea to these fellows that he had told me right away that the plane was stolen, over the phone. In the discussion at that time, and before the district attorney and others, the point was brought out that he had not told me and he admitted it. His conversation was did I know where Mr. Lacey was.

Q. What happened then; did they put you back in jail again?

A. No. They were very sorry they had caused me that embarrassment and took me out and we had supper. Bridgeman said, "There has been some adverse publicity about
112 this." I said, "I don't like this thing. It may be a joke." He says, "We will go up to the newspaper and straighten that out." The Associated Press had gotten hold of the story I had stolen an airplane and had been picked up with a stolen airplane in Monmouth and had flown it to Ottawa and stuff like that. I accompanied him and he went up to the newspaper and did the talking and the story was

straightened out. Later he took me to the district attorney's office and verified the whole thing. I raised the question, I said, "You fellows have detained me here. I have lost considerable time. I am in Ottawa and I should be in Galena." So the next morning they took me to the jail that night. So he says, "I will tell you, if you can't get a train out of here promptly and make connections"—my plane by this time had been taken back over to Ottawa. He says, "Take our plane," the plane in question, the plane that had been stolen from them. He says, "Take that and take it over to Monmouth. They have your machine over there." He said, "After this we would just as soon have it in storage in Monmouth as we don't care to leave it out in the field."

Q. Did you do that?

A. I did that, yes, sir.

Q. Did you fly over?

A. Yes, sir.

Q. Yesterday in the direct examination of Mr. Lacey and in the opening statement also, the assistant district attorney made the statement that there were certain names,
113 aliases, that A. J. Lacey used. Did you know about those?

A. Yes, sir.

Q. And he said there were certain code words used in those telegrams. Can you explain or account for that, why that was in the telegram?

A. I don't recall that I used any code words in them or in any telegrams that I ever sent.

Q. For instance, he mentioned the word stock.

A. Well, the stock was the common term used among bootleggers. It was a slang term to denote liquor in that part of the country.

Q. What was the reason you sent it in this form, because of the liquor that was in the plane?

A. Yes. That was the only thing I was interested in.

Q. You didn't want to say liquor in the telegram?

A. It wouldn't look good at that time.

Q. After all of this did Lacey leave that airport or did he keep on staying up around there or did he finally depart?

A. He left the airport. I had gone down to Bridgeman. Now I will tell you so you will understand the circumstances. He sat there and cried and his wife cried and one thing and another after I had gone over this deal of the trouble he had caused me and one thing and another, and then he sat down—

I said, "Old boy, why don't you go down there and straighten things out, if what you say is true?" He said, "Well,
114 Mac, I don't want to, if you will go down and see Bridgeman or have Bridgeman come up here so I can see him I will do anything in the world for you. Tell him I will work for him the rest of his life to clear up any damage that has been caused by bringing that plane back, and Bridgeman at that time, I think, had a warrant sworn out for Lacey and he was afraid of that because he couldn't stand to be investigated on anything because he was a deserter from the marines, and that question had been up before at different times, and he said if he could go and talk with Bridgeman he was satisfied he could straighten things out with him. So he prevailed on me to go down and see Mr. Bridgeman, to see what he could do.

Q. Did you go down?

A. Yes.

Q. After you came back what happened?

A. He was supposed to go to work. Bridgeman agreed with me if Lacey would work and send him so much money a week or month or whatever it was and pay him off that he would withhold the charges that he had against him. In other words, Bridgeman was wanting some reimbursement for the damage to his plane.

Q. Did you go down and tell Bridgeman that?

A. That is the word I had gotten from Bridgeman to tell Lacey.

Q. Did you tell Lacey?

A. Yes, sir.

Q. Was that acceptable to Lacey, what did he say?

A. He said, "That is fine." He said, "If there is
115 any hard work you want me to do why let me do it," and I wasn't very much interested in Mr. Lacey at that time, and I described it and told him to get himself a job and he did finally finish that deal at McGregor and got the money out of the student and some question came up about taking care of Mr. Bridgeman on anything and he said "To hell with Bridgeman." We can take care of him any time. He had to have clothes. He had to send his wife home.

Q. What happened then, did he still continue to stay with you there?

A. No. He resented working under those conditions and so there were arguments followed and I got rid of him. It was getting along late, anyway.

Q. What time of the year did you get rid of him? Was that around December, 1926?

A. It was about—it was before that.

Q. Was it in November?

A. Yes, November sometime.

Q. When were you next arrested on this charge?

A. The government served a notice on me I think about a year ago, wasn't it?

Q. About a year ago? Did you see Mr. Lacey at any time after that?

A. I saw him twice after that before I saw him here.

Q. Where did you see him?

A. I saw him in East Dubuque in the Hill Top Inn.

Q. Was there any conversation there?

A. Yes, slightly. He told me he had been in Chicago at the Department of Justice and he looked over some-
116 body's shoulder and he saw a letter somebody had written in that they were going to get me on some booze operations, and he referred to a car that I had driven there for two or three years and he says, "they have got that now." I says, "You want to get that straightened out, that is a car I had and sold rather to a man by the name of Arthur Stevens at Sells Mound, a Wyllis Sinclair roadster. He says, "they are after you. They have got your number on that. He said "that was a hot car." I says, "that is fine. If that is a hot car I want to know it," and I says, "as far as the booze operations go, that has been thoroughly investigated, and I says furthermore, "I don't want to talk to you. This is none of your business," and walked out.

Q. When did you see him after that?

A. I saw him in Chicago when I was subpoenaed on a trial that he was on on the theft of this Thomas-Morris or Yackey plane reported from Lyons, Illinois, and flew into Iowa and later sold to Mr. Jungwirth.

Q. Had that been on your airport?

A. Yes, sir.

Q. Did you at the time that Lacey flew that ship of Bridgeman's up to your airport, file the serial number off the airplane?

A. I did not, absolutely.

Q. Did you paint it with some paint you found there?

A. No. That is a lie pure and simple. I never left the house that day.

Q. Did you take a check of $150.00 and go down town
117 and cash that check and give him $150.00?

A. I never gave Lacey $150 in my life.

Q. Did you make an arrangement with him whereby you were supposed to go to Amarillo, Texas, and lease a field down there for winter flying?

A. I did not. That is a lie.

Q. Did you instruct Lacey to go down to Ottawa to get this ship?

A. I did not. Lacey left my employ and told me very proudly and haughtily he could go anywhere and get a ship and that he had arrangements made with Bridgeman.

Q. Did you instruct Mr. Lacey to go down to Richmond, Indiana, and get the Anderson ship?

A. I did not. I didn't know Anderson had a ship in Richmond, Indiana.

Q. Did you ever have any conversation with Lacey regarding the Anderson ship?

A. Yes, I did.

Q. Prior to the time it was taken?

A. No.

Q. When.

A. After I had come back from Ottawa, Illinois, in his behalf and some later developments—

Q. What did he tell you at that time?

A. He told me at that time—we got into considerable of an argument—and I told him to take his wife—that he had caused me plenty of trouble and I was sorry for him, but the best thing he could do was to get out of there, run
118 him away. In fact, I brought pressure to get him away.

He was nothing but a liability, and he was trying to get my sympathy. It was getting along in the winter and he didn't have any money he said. He said, "Mac, I have got another wife on the coast." He said, "I will tell you some of my history." He said that he had stolen airplanes on the West Coast when he was associated with the government, and sold them to Nicaraguan officials. I don't remember the details, and that he had later stolen a plane in Michigan and later burned it up to destroy the evidence, and later stole a plane in Richmond, Indiana, and took it to Minneapolis and sold it to this man up there, and that he was watching this plane because he thought he was going to have some trouble about it. I said "if you are, get out of here." He also said about this particular plane of Bridgeman's, he said that was really—he stole it but he said there were "other conditions

back of that between Bridgeman and I, and that I can face him any time." That is what he told me.

Q. Did you ever authorize Lacey to take the Bridgeman plane down to Texas and Oklahoma and so on?

A. What was that question?

Q. Did you authorize Lacey to take the Bridgeman plane away from the field and take it to Oklahoma or Texas?

A. I did not authorize him to take it to Oklahoma or Texas or anything; didn't know he was going.

Q. Did you ever have any agreement about opening up an airport in Amarillo?

A. Not at that time. After I had been to Ottawa
119 that time down at Ottawa, after I was arrested, they had a man there by the name of Robert Heth that had ridden back with Bridgeman from Guymon or somewhere down here around Amarillo, I think his home was, and he had told me in great detail all about the country because I had asked him a lot of questions.

Q. Is that the first time you met this man?

A. Who?

Q. You were talking about?

A. Heth? Yes, absolutely. Mr. Bridgeman introduced me to him.

Q. That was after the plane was accounted for?

A. Yes, sir. He was one of the follows that was there in the party.

Q. Did you direct or have any knowledge or any agreement with Mr. Lacey in so far as bringing your plane down here to replace the Bridgeman plane and take the Bridgeman plane back to Ottawa?

A. I did not. The only agreement I had with Lacey at that time, he was to go with my plane to McGregor—

Q. Did Lacey take that plane into Kansas without your consent?

A. Absolutely, brought it into Kansas without my consent. He had my consent to fly it to McGregor, Iowa.

Q. Did you ever at any time pay Mr. Lacey the sum of $250.00?

A. I never paid him $250.00 at any time, no, sir.

Q. After this plane was down at Inman, Kansas, how
120 did you get that plane back?

A. The day following the notice that I got from the authorities, whoever it was, Mr. Bridgeman called me on the telephone, long distance, and called my home and my wife

directed him that I was in Monmouth, and so I got in touch with him and he said, "Your plane is down here, Mac, but I can't find Lacey" and he says, "What do you want done with it?" We talked there about his plane. He said he had found his plane. Well, I said, "Bring mine back here to Monmouth" and he hired a pilot and brought it back and I paid him I think $75 for bringing it back.

Q. Mr. McBoyle, have you ever been in Texas before?

A. I never have.

Q. You never even have been in Texas?

A. No, sir.

Q. Had you ever been in Oklahoma before this time?

A. No, sir.

Q. I am going to ask you now whether you are guilty as charged in this indictment.

Mr. St. Lewis: Object to the form of the question. That is for the jury to decide.

The Court: Let him answer the question.

Q. I will withdraw the question. You are charged with transporting an airplane, Waco airplane, motor No. 6124, serial No. 256, from Ottawa, Illinois, to Guymon, Oklahoma, knowing that the airplane had been stolen. Is that true?

A. That is not true.

Q. How did you come to Oklahoma, Guthrie, Oklahoma?

A. By airplane.

121 Q. When did you leave there?

Mr. St. Lewis: I object to that as to how he came down here. We don't care about that. That doesn't tend to prove or disprove any of the issues in the case back here in 1926.

Mr. Brown: I might suggest that is a fact to be used in connection with this.

The Court: You mean for this trial?

Mr. Brown: Yes, sir.

The Court: Sustained. I can't see how that would have any connection with the case.

Mr. Brown: It would be material in establishing the length of time that it takes to come down to this part of the country by airplane.

The Court: Well, the jury can exercise their own judgment

about that. They all read the newspapers and we are on an air mail line between here and Chicago. That is general information. Objection sustained.

Cross Examination

By Mr. St. Lewis:

Q. You are in the same business now you were at Galena, Illinois?

A. Yes, sir, partly, I dropped the garage business.

Q. How about the alcohol?

A. I am not in the alcohol business.

Q. What did you mean when you told the Court and jury that you directed the man from McGregor, Iowa, to where you thought he could get some alcohol if you were not in the business then?

122 A. Not entirely in that business. I directed him to a friend of mine where he could get it.

Q. Not entirely. Tell the Court and jury how much you were in the business.

A. In as much as I know some of the bootleggers.

Q. And you knew their language, did you?

A. Yes, sir.

Q. You spoke their language?

A. To some extent.

Q. You knew what "stock" meant as you testified on direct examination?

A. Yes, sir. One of my own terms for it, anyway.

Q. Other than alcohol did you handle whiskey?

A. I did not.

Q. As a matter of fact, that is what that port was used for in Galena, wasn't it?

A. That is a lie.

The Court: Don't answer questions like that. He has a right to ask you.

A. That is not true.

Mr. St. Lewis: You be a gentleman with me and I will try to be with you.

A. I beg your pardon.

Q. (By Mr. St. Lewis) How much of the airport was devoted to handling alcohol?

A. None of the airport was devoted to handling alcohol.

Q. Why were you so interested in getting rid of this
123 alcohol, as you say, Lacey had out here in Oklahoma?

A. Because through telephone conversation Lacey had been very nervous about it, getting himself in trouble with it.

Q. Why did you care about that?

A. Because I had directed him and felt more or less responsibility for the action.

Q. You directed him to take that alcohol to McGregor, Iowa?

A. No, I didn't. I directed him where he could get it. He asked for permission to get the alcohol; asked where he could get it.

Q. Well, at that time you had been living at Galena from July 2 up until October 6, hadn't you?

A. Yes, sir.

Q. He knew where alcohol was handled, didn't you?

A. What was the question?

Q. Did he know alcohol was being handled there without asking you?

A. I presume he knew alcohol was being handled in that vicinity.

Q. But you did direct this man where to get this alcohol?

A. Yes, told him one of the places he could get it or I thought he could get it.

Q. There was a man named Youngruth, is that his name?

A. No such name.

124 Q. What is his name, Jungwirth?

A. I know a man by the name of Jungwirth.

Q. That is his business too, isn't it?

A. Not that I know of.

Mr. Brown: We object to that as being a collateral issue and not having anything to do with this case.

The Court: Overruled.

Mr. Brown: Exception.

Q. Answer, please, sir.

A. Not that I know of.

Q. He is there at Dubuque, Iowa, now, too, isn't he?

A. I think he lives in Dubuque.

Q. He is the man that you say that bought this plane that Lacey had there, this Yacki Scout plane?

A. He is the man that did buy it, yes, sir.

Q. He is in jail now for contempt of court, isn't he, on a liquor injunction?

A. I believe he is.

Q. What time did he move to Dubuque?

A. I don't know. He has been in Dubuque as long as I know.

Q. How?

A. I wouldn't know that. I think he was born and raised in Dubuque. I wouldn't know.

Q. He was at Galena too, wasn't he, at your airport?

A. He used to fly years ago, fly more or less at the Galena airport, yes, sir.

Q. You say the reason you left Galena, Illinois, was
125 you wanted to take the airport over to Dubuque, Iowa?

A. Yes, sir.

Q. That is the only reason, is it?

A. Galena is a town of 4000 and Dubuque is a town of 50,000 and a town in which I had more or less money, a neighboring town. My home and residence is still at Galena.

Q. You say the reason you were interested in this ship out here in Oklahoma was on account of the stuff that was in it?

A. I was not interested in the ship in Oklahoma, only inasmuch as Bridgeman and Lacey dictated to me.

Q. As they dictated to you?

A. I beg your pardon.

Q. As they dictated to you?

A. Yes, sir, if you want to put it that way.

Q. Lacey was working for you, wasn't he.

A. He was not.

Q. Never did work for you, did he?

A. Not in the sense of the word, in the sense you said.

Q. Sir?

A. Not on a salary in the way he said.

Q. Did he work on a commission basis?

A. He worked his machine off the field on a commission basis.

Q. Well, he worked for you then?

A. In a contract form, yes, sir.

Q. He worked for you then?

A. I wouldn't say that. He was there taking dictation
126 from me.

Q. How old a man are you?

A. I am 41 years old.

Q. How old?

A. 41 years old.

Q. And Mr. Lacey is 26 now, he was 23 in 1926, wasn't he?

A. According to those figures he gave that would be it.

Q. At that time you were 38 years old?

A. I believe that is about right.

Q. You said something about him arguing with you about making a living?

A. What I said about him arguing?

Q. You said he was arguing about making a living there.

A. He wasn't necessarily arguing about making a living, he was arguing about how much business—I didn't state we had an argument about making a living.

Q. You didn't mean to infer to the Court and jury that you allowed Steve Lacey to dictate to you as to what you should do?

A. Absolutely not.

Q. Do you want the Court and jury to understand he was there working for you, taking orders from you?

A. I do not.

Q. Did you ever spend any time in Canada?

A. I never did.

Q. Montana?

A. Yes.

Q. In 1924?

A. I don't know, thereabout.

Q. Now, when did you first learn that the United Air-
127 craft ship was missing?

A. You mean for a fact or according to hearsay?

Q. Well, when did you first learn it anywhere?

A. Please repeat your question.

Q. When did you learn that this Waco plane that was out here at Guymon, Oklahoma, was missing?

A. On October 11th.

Q. How did you learn that?

A. I learned that through a conversation with Mr. Bridgeman and through conversations with the local authorities in Galena, and through, I think it was at that time or very shortly after, an ad that was in the Aviation, a trade magazine.

Q. How did you talk to Mr. Bridgeman, over the telephone?

A. Yes, sir.

Q. Did you tell him at that time about this plane?

A. I did not because I presumed he knew about it.

Q. Why did you presume he knew about it?

A. Because Mr. Lacey had been down there many times and had been with Mr. Bridgeman and going in there with Bridgeman's plane.

Q. Then why would Bridgeman be calling you up asking about his plane if he knew that Lacey had it?

A. That was none of my affair. I don't know anything about it. I couldn't answer that question.

Q. Mr. Bridgeman called you from down around Hutchinson, Kansas, didn't he?

A. I wouldn't say whether it was Hutchinson, but
128 somewhere down in there.

Q. Somewhere down there?

A. Yes, sir.

Q. He told you that your plane was down there, didn't he?

A. Yes, sir.

Q. What did you tell Mr. Bridgeman?

A. I asked if it was a fact or something about the plane, asked him where the pilot was and if he had found Lacey anywhere. He wanted to know if Lacey was there. I said no. I said unless he heard further from him to take charge of the plane and bring it back.

Q. You were not a bit concerned. That wasn't any news to you, was it?

A. Yes, it was. I talked to him from Monmouth.

Q. Did you tell Mr. Bridgeman that was strange, that you didn't know it was down there?

A. Yes, I did.

Q. You told him that over the phone?

A. Yes, sir.

Q. Lacey had not stolen that one, had he?

A. He had taken that plane without permission to fly to Kansas.

Q. How?

A. He had taken that plane without permission from me to fly to Kansas. I had given him the plane to fly to McGregor, Iowa. In one sense of the word it was stolen.

Q. You gave him the authority to take it?

A. I gave him the authority to take it to McGregor, Iowa.

Q. So if he had it in Kansas it was stolen?

129 A. It was in Kansas without my permission."

Lacey came to my field and engaged in business there about July 1st, 1926, I believe. On that day he wanted to fly my standard four place airplane, he had a date he had made on some occasion in a little town down near Hinkley, Illinois. He didn't tell me he had been working for Dr. Neubauer. When I saw him up there a few days before he was in Dr. Neubauer's plane. He came in there before about June 15th with a Yacki sport plane. The second trip was with Dr. Neubauer's plane. After he cracked up my standard he returned to Galena in a Buick car. He left the plane at Sheridan, Illinois, where he cracked it up.

"Q. When he came into your field to go into your company did he have an airplane then?

A. He didn't come to my field to go into my employ. He came to the field with Dr. Neubauer on or about July 1st, and I think as far as I know he left with Dr. Neubauer's ship. Whether he returned to Hinkley, I don't know, but the next morning he showed up ready to take the Standard down to Sheridan, Illinois."

The first time he came there he came in a Thomas Morris Scout rebuilt plane about June 15th. That was the first time he came to the field. Then he made another trip in Dr. Neubauer's plane, as far as I know; it had his name on the side of it. Later he drove up a Buick on July 1st or 2nd.

He quit work some time November. I don't know that
130 he left the place entirely. It was not December 28th, 1927. Dr. Neubauer was not there in November, 1926, trying to employ him. Neubauer was never at my field to my knowledge.

"Q. He didn't find out that at that time you were paying him $35.00 a week and twenty per cent commission?

A. Not from me he didn't.

Q. Have you ever had any trouble with Dr. Neubauer?

A. No, sir.

Q. You never have injured him have you in any way?

A. Not that I know of.

Q. And what reason did Steve Lacey give when he quit you in November, 1926?

A. He didn't give any reason. He quit by request from me.

Q. Request from you?

A. Yes, sir.

Q. As a matter of fact wasn't it in December, 1928, when he said he was going to get out of the whiskey racket and alcohol racket, and he wasn't going to go into that stuff any more?

A. It wasn't in December, 1928.

Q. '26, I am talking about?

A. It wasn't in December, 1926.

Q. And you didn't tell him at that time he would have to keep his head still as you had the goods on him did you?

A. I didn't tell him nothing about it. I told him to
131 get the hell out of the place. He threatened me and I said "go ahead." I would take care of myself.

Q. You cursed and told him to get out of the place?

A. Very likely I did, yes, sir.

Q. Did you write a letter to Mr. Bridgeman along in March 11th, 1927, wherein you said you thought that it was a good idea to keep this man locked up?

A. I wouldn't say that I did. I don't remember.

Q. Well, will you say you didn't?

A. Read the letter, I can tell you. I wrote a letter to Mr. Bridgeman, yes, sir.

Q. What was your idea in keeping him locked up?

A. I don't know that I said that.

Q. Well, to keep him out of the way?

A. I don't know that I said that. I don't remember just exactly what was in the letter. If you will real the letter I can satisfy you maybe.

Q. Did you write this letter: (Reading) "Galena, Illinois, March 11th, 1927 . . . . .

Mr. Milroy: We object to counsel reading from some document that has not been identified or admitted in evidence.

Mr. St. Lewis: That is just what I am trying to do.

Mr. Milroy: If counsel desires to show the letter to Mr. McBoyle and ask him if he wrote it. We just as soon
132 have it go in as not, but we want it to go in the right way.

The Court: I think it would be better to have the letter identified.

Q. (By Mr. St. Lewis) Will you read this letter I hand

you marked Government's Exhibit No. 6, and state to the court and jury whether you wrote that?

A. Yes, sir, I wrote that letter.

Q. (Reading) "It appears that our mutual friend Steve has involved himself in another stolen airplane deal."

A. Let me read the letter.

The Court: I suggest if you want to offer that letter that you submit it to counsel.

Mr. St. Lewis: It is just a copy. I don't have the original. I offer it in evidence though at this time if the court please.

The Court: He said he had written the letter.

Mr. Milroy: There is no objection to the letter. Mr. McBoyle says he wrote such a letter and as long as the whole thing is in evidence we have no objection to it at all.

The Court: The letter is offered in evidence.

Mr. St. Lewis: Yes, I already made the offer.

The Court: Let the letter be admitted in evidence.

(Thereupon, Government's Exhibit No. 6 was received in evidence, and is as follows:)

Government's Exhibit No. 6.

Galena, Ill. March 11, 1927.

Willard F. Bridgeman,
133 Espy Chevrolet Co.,
Ottumwa, Ia.

Dear Bridgeman:

I suppose things are moving rather fast in the automobile business these days. It wont be long before the flying season is again in full swing.

It appears that our mutual friend Steve has involved himself in another stolen airplane deal. It has developed that the TM Scout ship that Steve sold to Joe Jungwirth in Dubuque, supposedly his, was stolen from a field at Lyons, Ill. At the time Steve sold the ship to Joe he informed him that he had been working for a fellow at a field who gave him the ship for wages owed him.

About a week ago Steve went to the man he had stolen the ship from and told him that he knew where his ship was and that he would get it back to him for $100.00 and expenses.

The bargain was made and the ship was seized with the blame laid on Joe. After an investigation the state officers began to see through the little deal and started closing in on Lacey.

While being questioned Lacey told said officers that you had arranged with him to steal the Waco at Ottawa. This of course was to clear himself on that deal and my object in writing you is to inform you of the conditions so as to enable you to collect any data you may have as to the stealing of your ship by Lacey. After hearing all these things I
134 am convinced that he is too dangerous a man to have at large and feel that anything either of us might do to bring him to his proper place is more than justified. In case you are questioned as to your ship you can rest assured that I will do anything I can to bring out the facts of the case. I regret very much at this time that I went as far as I did for Lacey. I was taken in by his story and believed him to be on the square. Now that I know what I do about him it is my desire that he be dealt with as he deserves.

Will be pleased to hear from you at any time.

As ever your friend,

WWM-EW

(Signed) A. McBoyle."

Q. (By Mr. St. Lewis) You stated on direct examination that you understood that Bridgeman arranged for this plane to be taken out there. Is that so?

A. I did at that time, until I met Mr. Bridgeman in Ottawa, and possibly a little further on through that. We had accused Bridgeman.

Q. You know better now don't you?

A. Yes, I do. I feel differently. I don't know differently.

Q. You don't want to leave the impression with this court and jury that Bridgeman arranged for this plane to be stolen do you?

A. No, I do not.

Q. What was your idea in seeing that this man was
135 penned up, this man Lacey, did he know too much; was that it?

A. No, sir. If he did he told all he knew, as far as I knew. There was nothing he knew in regard to me. The reason I wrote that letter, I can recall this—

Q. It was away along in March, 1927, wasn't it?

A. Yes, sir.

Q. The plane was stolen in October before that?

A. Yes, sir.

Q. Why were you concerned about that?

A. Because a Department of Justice man interviewed me very seriously, and pictured to me that Bridgeman was a criminal; that Lacey had him involved in that and was going to get Bridgeman in bad with his company and all the details he went through with Bridgeman, and I wrote Bridgeman the circumstances of what I got from them.

Q. Later on you went before the United States Commissioner in Chicago, Illinois, you and this bootlegger Jungwirth.....

Mr. Milroy: The characterization of this man is objected to.

The Court: That is hardly a proper designation.

Q. You and this man Jungwirth went before the United States Commissioner in Chicago, Illinois, and testified wherein he was charged with the stealing of this Yacki Scout didn't you?

A. I was summoned in there, yes, sir, and had to go.

Q. And the Commissioner became so disgusted toward you and Jungwirth that he threw the case out?

136

A. He did not. The case was thrown out because they couldn't identify the plane on certain numbers.

Q. You at that time were carrying out the threats made in your letter of March 11th weren't you?

A. No, sir, I wasn't. I was telling the truth in regard to the plane the same as I told the Department of Justice man that interviewed me.

Q. How came Mr. McBoyle to go to Richmond and get this man Anderson's plane?

A. Mr. McBoyle never went to Richmond.

Q. Lacey-I mean?

A. That I can't say.

Q. You knew Anderson didn't you?

A. No, sir.

Q. Knew what business he was in didn't you?

A. No, sir.

Q. Do you know what happened to him?

A. I knew what I saw in the paper.

Q. You didn't know what business he was in did you?

A. I did not.

Q. As a matter of fact didn't you tell Lacey to go over

there and get that machine, or that plane, because you had been high jacked out of it on account of a load of whiskey and didn't he go over there on the night train thinking that plane was yours thinking you had title to it and get that plane and bring it back?

A. I think you could answer that, it is ridiculous.

Q. I insist that the witness answer the question.

137 The Court: The attorneys have a right to ask a question and you must answer, and not argue with him, and don't volunteer any information.

Q. Let me ask you this. Why did you have your name put on the side of the Anderson plane?

A. I did not have my name put on the side of the Anderson plane.

Q. Didn't you have your name painted on there?

A. No, sir.

Q. The name of your company then.

A. McBoyle airport.

Q. Why did you have that put on?

A. Because he damaged the rudder of it in flying activities and took the rudder off of one of the ships with my name on it and put on there.

Q. You thought it was all right to take this man Anderson's plane and do that did you?

A. I didn't know the plane was Anderson's. I thought the plane was Lacey's.

Q. This was July 12th, 1926, wasn't it?

A. What was July 12th?

Q. When this Anderson plane was brought over there?

A. I wouldn't know exactly the date.

Q. You mean to tell this court and jury this man right beyond me was working for you from July 2nd to the 12th, and had a plane of his own?

A. He had left my place after cracking up the Stand-
138 ard and come back with this plane he said he had got from Michigan—Lyons or Pontiac, Michigan, I think it was.

Q. Then you put the name of the company on?

Q. Not at that time. I didn't put it on. He jammed his rudder and wanted to keep going and it takes a long time to get a piece from the factory and we finally let him take a rudder off the plane that was in the hangar that was not being used. My planes all had my name on them.

Q. Did Lacey tell you how he got that plane?

A. He did not.

Q. Did you ask him?

A. Yes.

Q. What did he tell you?

A. He told me he owned the plane and had a half interest in a field in Michigan.

Q. I thought you stated in your answer before that he didn't tell you how he got it?

A. He told me he had got it from Pontiac, Michigan; he owned the field there. There is where he had trouble with his wife.

Q. Didn't you try to sell that same plane to Dr. Neubauer sitting over there?

A. No, sir.

Q. That is not true?

A. That is not true.

Q. But the name of your company was on it?

A. One of my rudders was on that plane, yes, sir.

Q. That same plane was sold to a man by the name of Nelson in Minnesota wasn't it?

A. As far as I know it was.

Q. Before the deal was consummated up there, there was a long distance call put in for you wasn't there?

A. I think there was.

Q. If that was Lacey's plane why would he be calling you up?

Q. Mr. Lacey called me and wanted to know if it was all right with me to sell the plane. He owed me considerable money and was working off the field and flying some dates I had. He wanted to know if I could handle those dates any way if he sold the plane.

Q. That was your explanation of that long distance call?

A. Yes, sir.

Q. That was the plane that was afterwards taken to Montana where he was arrested?

A. As far as I know; I couldn't say.

Q. Is there another McBoyle living in Galena?

A. No, sir.

Q. Another William?

A. I beg your pardon.

Q. You testified on direct examination that you had some telegraphic communication with Mr. Lacey at Guymon, Okla-

homa. Let me ask you if this is the first telegram you received: "William McBoyle, Galena, Illinois. Have good tip on oil business. Conditions wonderful. Wire me—"

Mr. Milroy: That is objected to. This is the one marked for identification yesterday. I don't think, in fact, I
140 know they were not read into the record.

The Court: No, they were not read into the record. It would not be proper for the contents of those messages to go to the jury without identification, but you can present it to the witness and ask him.

Q. (By Mr. St. Lewis) Handing you Government's Exhibit No. 1, is that a copy of the telegram that you received from Guymon, Oklahoma, on October 10th, 1926, from a man who signed his name as Pat Sullivan addressed to William McBoyle, Galena, Illinois?

A. Well, I couldn't testify as to the exact wording.

Q. Well, is that about the wording?

A. It is about the wording, yes.

Q. Did you reply to that?

A. I think I did.

Q. Handing you Government's Exhibit No. 2, I will ask you to state to the court and jury if that is your reply, to Pat Sullivan at Guymon?

A. Yes, sir, I did.

Q. And then did you send a telegram on October 11th to Pat Sullivan? Handing you Government's Exhibit No. 3, I will ask you to state to the court and jury if that is the telegram?

A. Yes, sir.

Q. And in reply to that—I hand you Government's Exhibit No. 5, and ask you to state if that is a copy of the telegram that you received from Sullivan?

A. I wouldn't state—this seems to be muddled up quite a bit here in your copy. What is this down here?

Q. You can see it is the same word right above there.

141 A. I wouldn't say, but something of that order, yes, sir. I am not testifying that this is as I sent it. I couldn't.

Q. Well, it is practically that?

A. I couldn't testify to that. That has been three years ago. I couldn't testify directly.

Mr. St. Lewis: If the court please, I offer these in evidence at this particular time. I desire to ask the witness a few

questions, but before doing that I want to offer these in evidence.

Mr. Milroy: With respect to the ones Mr. McBoyle identified we have no objection to those going in. We might not have any objection to the others if we had a chance to see them.

The Court: Submit them to counsel first.

Mr. Milroy: The additional objection lies in the copies here except the one Mr. McBoyle said he had sent in this, that none of them indicate the point of origin. It can't be a true copy. The point of origin is on every telegram. Some of them are undated, and for the additional reason that I think there is but one that he has testified to positively.

The Court: There are two he testified about positively and the others he said it has been some time ago, but he recalled that was the substance of his telegram. Now there is one he wasn't so sure about.

Mr. St. Lewis: I didn't get the court's ruling. The
142 court will recall the Western Union man testified the records are destroyed after a year.

The Court: With one exception there the telegrams I think are admissible. That is the last one you asked him about. Now on some further examination of that it might be—let me see that telegram.

(Thereupon, the questions and answers regarding Government's Exhibit No. 5, were read.)

The Court: Objection overruled.

Mr. Milroy: Exception.

(Thereupon, the telegrams above referred to, Government's Exhibits Nos. 1, 2, 3 and 5 were received in evidence and are as follows:

Government's Exhibit No. 1.
(On Western Union blank)

Cash HM. 72.
Check: 33 N. H.
October 10, 1926.

To William McBoyle,

Place: Galena, Illinois.

Have good tip on oil business conditions wonderful wire me immediately how things are east does B suspect I have

invested also state whether you think it advisable to invest in this district.

Pat Sullivan c/o Western Union

16 KTOBAC 1030 PM.

Government's Exhibit No. 2.

143 (On Western Union blank) Will call.

Time Filed: 8:23 AM 11
Galena, Ill.

To Pat Sullivan,

Can you sell stock or store same and come in I explained that you were on the McGregor deal Welch wants some stock and B. wants to see you as soon as you come back from McGregor answer at once.

George 907 AM

Government's Exhibit No. 3.

Check: 30
Time Filed: 216 PM

18KT
Galena, Illinois. 10/11 1926.

To Pat Sullivan:

Hold stock watch market B offers five CS hard to explain George absence Welch will give 150 to learn soft pull in there and call me appearance counts.

M. C.
302P
Will Call.

Government's Exhibit 5.
(On Western Union Blank)

Check: 46.
Time Filed: 1130 AM
10/11 1926.

To William McBoyle,
Galena, Illinois.

144 Wire whether advisable for me to leave present proposition and return present market prohibits disposal or storage of stock within ten days stock increasing in value due to good business conditions and excellent weather also have good proposition for your co. wire immediately will wait for answer.

Pat 23NTXHO 1142AM

Q. (By Mr. St. Lewis) Now in view of those telegrams Mr. McBoyle tell the court and jury at this time who Pat Sullivan is?

A. That was supposed to be A. J. Lacey. He had three aliases, Pat Sullivan, George Bower and some others that he used.

Q. Why didn't you send this telegram to A. J. Steve Lacey?

A. Because he signed his name Patrick Sullivan. Generally when you are receiving correspondence from anybody you sign the correspondence that way.

Q. He had been working around you there from July second 1926 up until October 1926 hadn't he?

A. Been working around with me. He had been in and out of there, yes.

Q. You want the court and jury to believe at this time the reason you sent that to Pat Sullivan is because that is the way you received the telegram from him?

A. Yes. I have signed this the way I received it.

Q. Were you in the oil business?

145 A. Not necessarily. I am in it a little bit, yes.

Q. When you got this telegram here dated October the 10th, 1926: "William McBoyle, Galena, Illinois: Have good tip on oil business conditions wonderful wire me immediately how things are east. does B suspect. I have invested also state whether you think it advisable to invest in this district. Pat Sullivan, care of Western Union. What did you reply to that?

A. I don't remember of replying to that. I can't recollect all those telegrams. I don't remember that I got that telegram specifically as stated in that exhibit whatever that number is.

Q. Well, look at it again. "Does B suspect. I have invested." What did you take that to mean?

A. That part of it I remember, yes. I took that as Lacey's admission that he had done something with the ship other than what he had advised Bridgeman. I interpreted it he had stolen the ship from Bridgeman.

Q. Did you confer with Bridgeman then?

A. Bridgeman conferred with me.

Q. Did you tell Mr. Bridgeman that you had located that plane, that Steve Lacey has been missing since October 6, and he is down at Guymon, Oklahoma?

A. I didn't.

Q. Why didn't you?

A. Because Lacey told me he was in touch with Bridgeman himself and was taking care of his own business.

Q. If Mr. Lacey was in touch with Bridgeman why
146 would he still be asking you if Mr. Bridgeman was suspecting him?

A. This was the first time he wired me in regard to anything about the plane and my answer pleased me to death.

Cross Examination of Defendant William McBoyle.

(Continued)

Q. (By Mr. St. Lewis) Mr. McBoyle, before the noon recess you testified he sent this telegram to you in the name of Pat Sullivan, you thought that is the name he wired you? Is that right?

A. Yes, sir.

Q. And that is the only reason he used that name is it?

A. Yes, sir.

Q. And no other purpose that you have in mind?

A. No, I didn't. That was one of the names that he went by and that was the name the telegram came to me in therefore I answered it that way.

Q. There was nothing wrong with the telegram was there?

A. Not that I know of.

Q. If you wanted to use an assumed name—

A. I would like to have the telegram.

Q. The first telegram.

A. I would like to know what it is.

Q. The one in which you were talking about the oil business?

A. Is that the first one?

Q. Yes, sir; that one. You stated you received that
147 telegram all right.

A. I received the telegram to the effect as this one states.

Q. That is Government's Exhibit No. 1, isn't it?

A. Yes, sir.

Q. And you replied to that telegram?

A. I think I did.

Q. And sent the telegram to Pat Sullivan?

A. Yes, sir.

Q. And that is marked Exhibit 2?

A. Yes, sir.

Q. Tell the Court and jury why you signed this George, when your name is William W. McBoyle?

A. I go by the name of George sometime. There has been a joke around the field and I used to kid the boys around there and would say, "Let George do it," and I told you why I did that. I explained to you it was on account of the McGregor deal. "Welch wants the stock and R wants to see you, meaning Bridgeman. As soon as you come back from Amarillo". Answer at once."

Q. Your explanation to the Court and jury for the reason you signed that "George" instead of William W. McBoyle, is because they kidded you around the field?

A. Partly on that account and partly because Mr. Lacey signed his name "Pat Sullivan."

Q. There was nothing wrong with it?

A. No, sir, not any more than I was directing him on this stock. I was involved in that case a little bit on this proposition I told you about.

Q. Handing you Government's Exhibit No. 3, why did you sign that telegram "Mc"?

A. I signed that Mac. It is shown here as I signed it. I signed it "Mac."

Q. "M" period then "C" period, isn't it?

A. I didn't sign it that way. I signed my telegram "Mac." I will read the telegram.

Q. Just answer my question. Now, I hand you Government's Exhibit No. 4. Who is that addressed to?

A. That is addressed to McBoyle.

Q. You got that did you?

A. I wouldn't be able to testify to the fact that I was there but I think I did.

Q. Who was that signed by?

A. Pat.

Q. Now this Government's Exhibit No. 5, to whom is that addressed?

A. This one is addressed to William McBoyle, Galena, Illinois.

Q. Who signed that one?

A. Pat.

Q. You got that one, didn't you?

A. Yes, sir.

Q. Are any of those telegrams addressed to you as "George"?

A. All of them—I beg your pardon, I didn't get that question.

Q. Did you receive any of those telegrams addressed to George McBoyle?

A. No, I did not.

149 Q. They all came William, didn't they?

A. Yes, sir.

Q. Now, referring to the first telegram: "Have good tip on oil business. Conditions wonderful. Wire me immediately how things are east. Does B suspect I have invested. Also state whether you think it advisable to invest in this district." What do you take to be the meaning of the word "invested" wherein he said "does B suspect I have invested"?

A. I took that to mean about some deal that Lacey and Bridgeman had had. I didn't know anything about that.

Q. Did you send him out there to make any investment at Guymon, Oklahoma?

A. No, but I knew he had the stuff in the plane.

Q. You don't mean to tell the Court and jury that Bridgeman, whatever his name was, was dealing in alcohol or liquor, do you?

A. That is just the point that I do not want to tell the Court and jury.

Q. But your explanation of the interpretation of this code wire that you received from Pat Sullivan is that you thought, "Does B suspect I have invested," that he was referring to liquor, is that right?

A. No, not necessarily.

Q. What do you think he was referring to?

A. I didn't know. I couldn't answer that particular thing. I didn't answer that particular thing, I don't think. I don't know what it is.

Q. Just tell the Court and jury how you interpreted
150 that wire?

A. I interpreted that wire to refer to some business Lacey and Bridgeman had, as Lacey had explained to me and Lacey was flying Bridgeman's plane, and I was partly involved in getting the contraband liquor in that plane or arranging for Lacey to get it, and I didn't want to become involved with Mr. Bridgeman.

Q. You had known Mr. Bridgeman for a number of years, had you?

A. I had not.

Q. You never knew him to be in the liquor business, did you?

A. I did not.

Q. So you had no reason to believe that he and Lacey were carrying on the alcohol business out here at Guymon?

A. I was not inferring they were carrying on an alcohol business at Guymon.

Q. There was nothing said in that wire about stock, was there?

A. Which wire was that?

Q. Number 1, Exhibit No. 1. The oil business.

A. No, there was nothing said in there about stock.

Q. And you know what B refers to in that telegram?

A. I took it to refer to Bridgeman because Bridgeman had done business over the 'phone several times.

Q. Bridgeman is the man who lost the plane and he wanted to know if he had been suspected, didn't he?

A. I didn't know it at that time.

Q. Pat Sullivan wired you on October 10, 1926, four
151 days after he stole the plane and wanted to know if Bridgeman suspected him, didn't he?

A. I wouldn't say he did.

Q. Can you make any other interpretation out of that telegram than that?

A. Yes.

Q. Just tell the Court and jury what that interpretation is, "Have good tip on oil business. Conditions wonderful. Wire me immediately how things are east. Does B suspect I have invested. Also state whether you think it advisable for me to invest in this district." Tell the Court and jury.

A. Yes, sir. With reference to the "Have good tip on oil business," I inferred that he was referring to the contraband about the liquor business. That is what I took that to mean. Because that had been discussed, and the possibility of making money a long time at different times in the summer, and Lacey had handled liquor on different occasions on his own hook.

Q. Driving your planes, wasn't he?

A. He was not.

Q. He never had a plane of his own, did he?

A. Yes, sir; he did. That is how I first met him.

Q. That plane was sold?

A. After that time.

Q. Did he have a plane after July?

A. He didn't sell it the day he came in there.

Q. When did he sell it?

A. Some time after that.

152 Q. How long after?

A. I wouldn't think for four or five weeks.

Q. He never had a plane any time up to December 28th, did he?

A. Certainly he had a plane.

Q. A plane of his own?

A. Yes, sir.

Q. What kind was it?

A. A Waco Nine.

Q. The one he got over at Richmond, Anderson plane?

A. I don't know.

Q. The one that had the words "McBoyle Airport" on it, with the word "Steve" on the side?

A. It had the word "Steve" on the side.

Q. That is the one you tried to sell to Dr. Neubauer for $1,100.00?

A. Yes, sir. No, sir. I never tried to sell that to Neubauer at any time.

Q. Did you ever try to sell Dr. Neubauer a Waco plane in 1926?

A. I very likely did because I was the Waco dealer in that territory and I was selling airplanes.

Q. Now you say that you may have?

A. I didn't sell him. I didn't offer to sell him any plane either.

Q. Go ahead with the interpretation of that code telegram?

A. "Does B suspect I have invested?" (Reading)

Q. All right. What is the code interpretation there?

A. I inferred that it meant something with reference to his and Lacey's deal as Lacey explained the proposition to me when he came to my place, and he and Bridgeman had had a deal of their own, and that Bridgeman had given
153 him the proposition unknown to some of the stockholders there in Ottawa.

Q. Did he tell you what the deal was?

A. The deal was that Lacey was to take the plane out where he could make some money, that Bridgeman had not been flying the plane himself, hauling any passengers. The

stockholders were becoming involved in quite a bit of controversy because the plane was not making money.

Q. How far is Galena from Ottawa?

A. I judge Galena from Ottawa is something like 150 miles.

Q. Do you know why Pat Sullivan should not have sent that telegram to Bridgeman himself to find out about the investment rather than wire you? You, who knew nothing of it? Why couldn't he have wired him? It would have been a cheaper wire to Ottawa than it was to Galena.

A. I don't know anything about the rate or anything about that. Lacey had been conferring with me on this liquor stock right along, wanting to know what to do with it, inferring I was involved and had him involved in the deal.

Q. You said Mr. Bridgeman had nothing to do with liquor.

A. Not in this particular case I know of, no, sir.

Q. Go ahead with the rest of the interpretation of the telegram.

A. (Reading) "State whether you think it is advisable to invest in this district."

Q. He wasn't out there to invest any money for you, was he?

A. He didn't have any of my money to invest, no,
154 sir.

Q. Why was it he asked you that question?

A. He had talked about finding a place to haul liquor down in here.

Q. Out at Guymon, Oklahoma?

A. No town mentioned, but the possibility of that business had been talked over frequently.

Q. That was a great portion of the business there at your port, wasn't it?

A. No, sir, not in reference to me. There has been some liquor business in that country, certainly.

Q. Handing you Government's Exhibit 2, wherein you state, "Can you sell stock or store same and come in. I explained that you were on the McGregor deal. Welch wants some stock and B wants to see you as soon as you come back from McGregor. Answer at once." You knew at that time he wasn't at McGregor, didn't you?

A. Yes.

Q. McGregor is away up in Iowa, isn't it?

A. Yes, sir, north of Dubuque.

Q. He was out here in Western Oklahoma?

A. Yes, sir.

Q. Why did you want him to report that he was at McGregor?

A. To verify a statement I had made to Mr. Bridgeman on his suggestion.

Q. You had lied to Mr. Bridgeman as to where he was, had you?

A. Lacey told me—

Q. Answer my question. You had lied?

A. Yes, sir, in a sense of the word I lied to Mr. Bridgeman, you bet.

155 Q. Now let me ask you this, if the word "stock" here was the code word for plane and let me read it in the light of that. "Can you sell plane or store same and come in. I explained that you were on the McGregor deal. Welch wants some stock." Welch did buy a plane, didn't he? A. He did not.

Q. Did this man Lacey give Welch lessons in flying a plane? A. Yes, but he didn't buy any plane.

Q. He didn't buy it afterwards? A. No, sir.

Q. But there was a deal on to sell him a plane?

A. There was not.

Q. He just gave him lessons, was that the idea?

A. That was the idea.

Q. Why did you use the letter B; why didn't you spell out Mr. Bridgeman's name?

A. Because that is the way he asked me in his previous telegram.

Q. So you didn't spell out Mr. Bridgeman's name because it had not been spelled out in the other telegram?

A. That was the only reason I know of. I was not particularly interested in giving Bridgeman the inference that I was interested in any way in running booze around in his plane.

Q. Why were you so solicitous of having Pat Sullivan answer at once?

A. Because Bridgeman had called me up wanting to know where Lacey was and I had told Bridgeman at Lacey's instigation the day he called me up, he had gone to McGre-
156 gor. I expected he had, and Bridgeman didn't say anything at that time about his plane being stolen or anything. I was working on the theory that Bridgeman and Lacey were working together, and Lacey was working for Mr. Bridgeman.

Q. And that was the telegram you signed "George?"

A. Yes, sir.

Q. Now you sent another telegram the same day, didn't you? A. Yes, sir, I think I did.

Q. To Pat Sullivan, Exhibit 3. Let's hurry along.

A. Yes, sir.

Q. You sent that telegram, didn't you?

A. One to that effect. I wouldn't say it was that identical one.

Q. (Reading) "Hold stock. Watch market. B offers five cents. Hard to explain George's absence. Welch will give 150 to learn soft pull in there and call me. Appearance counts." It is signed "M. C." Tell the Court and jury what you mean by hold stock.

A. I had received a call from Mr. Bridgeman that morning and discussed the proposition, and he said "some son-of-a-gun has stolen my plane." We discussed it. I said, "You are kidding me, aren't you Bridgeman, isn't Lacey working for you?" He said, "No. Some son-of-a-gun has stolen my plane." Along with that I called, not the sheriff's office but the chief of police and he informed me that he had had correspondence from Ottawa stating about watching out for a plane, and what was the rest of that telegram, please?

157 Q. That is just to hold stock. That is why you used those two words, is it? Now wasn't the word stock, wasn't that a code word between you and Lacey, as Mr. Lacey testified to? A. That was not.

Q. Wasn't that word airplane?

A. No, it didn't mean airplane because Lacey had been calling and wiring me three or four times previous to that, what to do with this liquor.

Q. Let me read you this wire using the word airplane where the word stock is put in: "Hold airplane. Watch market. B offers five CS. Hard to explain George's absence." Now, what did you mean when you wired Pat Sullivan to watch market?

A. If he was going to get rid of that booze I wanted him to be careful because if the officers were watching him, because Bridgeman had this information out against him, so he wouldn't get in trouble with this liquor.

Q. It wasn't your liquor, was it?

A. Not my liquor but I was partly involved in the deal, and because I recommended the deal, and was being held responsible.

Q. You were not down here in Oklahoma. You couldn't get in any trouble.

A. Yes, I could get in trouble.

Q. You were not down here, were you?

A. No, sir.

Q. (Reading) "B offers five CS. What does that CS stand for?

A. $500. Bridgeman had posted a reward. I found that out.

Q. So that was the code for letting Lacey know that
158 Bridgeman had offered $500 reward?

A. Yes, sir.

Q. Did you claim that $500 reward?

A. No, sir.

Q. Now, "Hard to explain." What explaining did you have to do? You were not in on the deal.

A. I did have explaining to do, yes ,sir. That is the very reason that I wired him that. Bridgeman had called me previous to that asking the whereabouts of Lacey in a casual way and I told him that Lacey had gone to McGregor on that student deal and I passed that information on, and then I found out, got a call from Lacey somewhere in Missouri, near Keokuk. I told Lacey at that time, I says, "What do you mean be [by] being down there?" He told me he couldn't possibly land on the field at McGregor, and wanted to know what to do with the liquor. I said, "I have got some friends in Keokuk, go in and see them." The next I heard from him was this telegram, and I assumed he had the liquor in and was running around the country with it, and the first thing he knew would get tripped up and involve me in some way or get Bridgeman in bad some way by having the liquor found on his plane at some place.

Q. That is what you meant by "Hard to explain"?

A. Yes, sir.

Q. You knew as a matter of fact the sheriff and the deputy sheriff at Guymon looked over this plane and there wasn't any liquor in it at all.

Q. [A.] I dont know anything about that. I do not.

Q. You heard them testify to that, didn't you?

A. Not as I remember of.

159 Q. You heard them testify they examined the numbers, didn't you?

A. I did.

Q. You heard them testify the numbers had been changed?

A. I did.

Q. Were those numbers changed?

A. I do not know.

Q. You don't know?

A. No, sir.

Q. Going on to this telegram Government's Exhibit 3. "George's absence hard to explain" or "Hard to explain George's absence. Who is George?

A. I referred that to Mr. Lacey in that case.

Q. Nothing wrong about the deal was there? It was an above board deal, wasn't it?

A. As far as I was concerned, yes, sir.

Q. Why didn't you say, "Hard to explain your absence"? What were you trying to keep covered up?

A. I was trying to keep covered up in connection with the liquor business.

Q. You were trying to keep from being involved, weren't you, on the airplane?

A. Not on the airplane. The airplane was a deal separate from me.

Q. "Call me. Appearances count." Why did you want Mr. Lacey to make his appearance back there?

A. I wanted him to make his appearance back there to protect the lie I had told Bridgeman about him going to McGregor.

160 Q. Wanted to protect your lie?

A. I had told him at his instigation as he told me. He says, "If Bridgeman calls me tell him I have gone to McGregor on that student deal."

Q. You just wanted to protect your lie you had told Bridgeman?

A. Yes, sir.

Redirect Examination.

By Mr. Edler:

Q. Did you in fact think he had gone to McGregor?

A. I did.

Q. Then you told that to Mr. Bridgeman, did you not?

A. Yes, I did.

Q. At that time it was the truth, was it not?

A. It was.

Q. Then later on you found out it was not the truth?

A. I didn't know then it was not the truth. It was the truth he went to McGregor as far as I knew, according to the information that Lacey gave me he had gone to McGregor and because his party and some other people were there he didn't land because he had the stuff in the plane.

Q. Then you didn't intentionally lie in the first place when you spoke to Bridgeman, did you?

A. Not intentionally. I explained all that as Lacey had told me.

Q. And you didn't lie?

A. Well, I can't say that I did.

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161 Joseph J. Jungwirth testified on behalf of the defendant, as follows:

My name is Joseph J. Jungwirth. I live at Dubuque, Iowa. Am at present serving sixty days sentence for contempt of court in violation of a Federal injunction. I know Mr. Lacey, I had some business transaction with him with reference to purchasing a Yacki sport airplane. I couldn't say as to the date. It was the middle of the summer as close as I could get to it. I imagine it was 1926 or 1927. I do not have the plane now.

Cross-Examination of Mr. Jungwirth.

It was about the middle of the summer as close as I can remember. I guess I have bought about three airplanes in my life from McBoyle. I bought this one from Lacey. I don't know whether Lacey was working for McBoyle at the time. I don't know as to that. I run a night club and a restaurant and a garage. I am now in the real estate business and garage business at Dubuque. I violated an injunction up there on account of the liquor laws and had to go to jail.

Mr. Milroy: Please mark this Defendant's Exhibit No. 4.

(Thereupon, the document referred to was marked Defendant's Exhibit No. 4.)

Mr. Milroy: I wish to offer in evidence a certificate of the Secretary of State of the State of Illinois duly authenticated under the seal of the state.

Mr. St. Lewis: I object to that. The purpose of this I take it is to refute that an airplane was stolen.

The Court: Objection overruled.

162 (Thereupon, Mr. Milroy read Defendant's Exhibit 4, said exhibit being as follows:)

Defendant's Exhibit 4.

State of Illinois
Office of
The Secretary of State

To Whom These Presents Shall Come, Greeting:

I, Louis L. Emmerson, Secretary of State of the State of Illinois, do hereby certify that an examination of the records of the office of the Secretary of State discloses that there has never existed in Illinois a corporation, either domestic or foreign, entitled the United States Aircraft Corporation.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 8th day of February, A. D. 1928, and of the Independence of the United States the one hundred and 52nd.

(Signed) LOUIS L. EMMERSON,
Secretary of State.

(Seal)

W. F. Bridgeman, was thereupon recalled as a witness on behalf of the Government in rebuttal, and having been previously sworn, further testified as follows:

Mr. Milroy: This man has been in the court room and he is the one witness that I said we might want to use again.

Mr. St. Lewis: Now, counsel is wrong as usual because the man hasn't been in here and I will let the man go on the stand under oath and testify as to whether he was
163 ever in this court room until just now.

A. (By the witness) I wasn't in the court room when the court was in session. Only when it was adjourned.

Q. (By Mr. St. Lewis) Did you come in just now when I called you?

A. Yes, sir.

Mr. Milroy: I will take his word for it.

Mr. St. Lewis: There you are.

Direct Examination.

By Mr. St. Lewis:

Q. What is the name of your company up there that lost that airplane?

Mr. Milroy: Objected to as not the best evidence. The Articles of Incorporation would be the best evidence.

The Court: Overruled.

Mr. Milroy: Exception.

Q. What is the name of it?

A. To the best of my knowledge, United Aircraft Corporation.

Q. You lost a Waco plane, didn't you?

A. Yes, sir.

Q. It was found out here in Guymon, Oklahoma?

A. Yes, sir.

Q. (By Mr. Milroy) The District Attorney didn't ask you to produce your Articles of Incorporation, did he?

A. No, sir.

Q. (By Mr. St. Lewis) Have you got any with you?

A. No, sir.

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164 H. J. Neubauer, recalled in rebuttal on behalf of the Government, testified as follows:

Direct Examination.

By Mr. St. Lewis:

Mr. Milroy: This man has been sitting here all morning.

Mr. St. Lewis: You all agreed the rule was off after they testified.

Mr. Milroy: I didn't agree anything about Neubauer. I am objecting to it.

The Court: Ask the question and we will determine whether or not this is such a question as his absence would affect one way or the other.

Q. (By Mr. St. Lewis) Did the defendant William McBoyle of Galena, Illinois, in the year of 1926 offer to sell you a Waco airplane?

A. Yes, sir.

Mr. St. Lewis: I want to find out whether it had been bought from Richmond.

Mr. Milroy: I move the answer be stricken until the Court passes on the objection.

The Court: The answer will be stricken and not considered until an objection can be made and passed upon.

Mr. Milroy: That is a matter that was gone into on Mr. McBoyle's cross examination this morning when this witness was in court. If I had known this was going to be gone into, certainly the District Attorney had knowledge of it—

Mr. St. Lewis: I will withdraw it then to save time.

165 The Court: Anything further?

Mr. St. Lewis: The Government rests.

Mr. Milroy: At the close of all the evidence the defendant desires to enter a demurrer to the evidence and to enter a motion requesting the Court to direct the jury to find the defendant not guilty on the grounds urged in the motion at the conclusion of the Government's case, and additional grounds that it appears that there is a fatal variance between the allegations in the indictment concerning the name of the owner of this airplane.

The Court: Overruled.

Mr. Milroy: Exception.

The Court: The Court is of the opinion in construing this statute that since the statute does not require that even the name of the person from whom the motor vehicle is alleged to have been stolen should be set out, if they had not mentioned the name of the owner in this case, the indictment would still have been good, but since they have mentioned it, it can only be considered as surplusage but the variance in the name I think will not be fatal to the inidctment.

(Hereupon, Court adjourned until 9:30 o'clock A. M. Monday morning, May 27, 1929, at which time the Court reconvened and all parties being present as heretofore, the trial of the above and foregoing entitled cause was resumed
166 and further proceedings had therein, as follows, to-wit:)

The Court: You may proceed.

Mr. Milroy: If the Court please, on behalf of the defendant we move to exclude the evidence and testimony of the witness Lacey, first because Mr. Lacey admitted on the witness stand that he was involved in the theft of certain planes.

The Court: Motion overruled.

Mr. Milroy: Exception.

Mr. Milroy: There is one more thing I would like to take up now. Now, Mr. St. Lewis asked some questions of Mr. Mathey, one of our character witnesses, which questions seemed to indicate that Mr. McBoyle had been involved in some crimes that were not covered in this indictment. At that time an objection was made to that line of questioning. Unless the District Attorney at some time in the course of the case would connect up his questions or would produce some sort of proof that would be stricken and he has not done that.

The Court: Very well, Gentlemen of the Jury, in the introduction of evidence in this case on cross examination of the witness Mathey and the defendant McBoyle, the District Attorney asked certain questions relative to former offenses, and asked the witness Mathey whether or not he had knowledge of further offenses alleged to have been com-
167 mitted by the defendant McBoyle. You are instructed that unless evidence is actually introduced by the Government—

Mr. St. Lewis: You will remember my question referred to 1924 and I know and counsel knows that I couldn't introduce before your Honor and this jury the facts relative to any other crime. That is a crime that took place in 1924 when the charge here is laid in 1926. I would be prohibited from doing it, and it would not be proper evidence.

The Court: Let me make the record and you gentlemen can discuss it. You are instructed that unless the Government introduced evidence later showing that such offenses had actually been committed, then you will disregard that part and not consider it in this case.

Mr. St. Lewis: Do I understand your rule that I should have introduced evidence along that line proving another crime committed in 1924?

The Court: Absolutely, insofar as the credibility of this particular witness is concerned. You couldn't prove that in support of this offense charged in this indictment. You were cross examining the witness.

Mr. St. Lewis: On an investigation he made.

168 The Court: On an investigation he made and you asked him if he made that investigation.

Mr. St. Lewis: Yes.

The Court: Well, now, if you left the impression with the jury that an offense had been committed in 1924 or at any other time which he could have investigated in arriving at his judgment—

Mr. St. Lewis: Your Honor, Mathey was not on trial for the failure to make this investigation, and I knew that I had no business going into that crime when this man was on the stand and for that reason stayed away from it.

Mr. Milroy: I wish to take an exception to the learned counsel's statement.

The Court: There is no doubt in the Court's mind the question was asked as going to the credibility of the witness Mathey, and that was the only purpose for which it was permitted. If the question was asked him if he knew of an offense committed by the defendant in 1924, or at any other time, and he stated he did not and later no evidence was introduced by the Government on that point to show that the investigation made by the witness Mathey was a supple investigation and was not sufficient for him to make the statement to the jury that he did make, that he found this
169 man was a man of good character and so forth, then you will not regard that question and not regard the evidence on it.

Mr. Milroy: Along that very same line, my dstinguished adversary has made some statements concerning the law of the case. Now, Mr. McBoyle was on the witness stand and he is the defendant in this case and his character, his reputation and everything is at issue when he takes the witness stand. I think that is the rule. Now, these gentlemen by indirection undertook to do something that couldn't be done directly by asking certain questions and he is bound by Mr. McBoyle's statement.

The Court: Well, he would be unless he could show that his statements were not true.

Mr. Milroy: Well, I think, if the Court please, there wasn't a particle of evidence that is competent only going to the credibility of the witness and does not prove as to the commission of the offense with which he is charged. When the defendant takes the stand, then as you have indicated, he lays himself open to such examination as the opponent assumes to make. Now if the Government asked him if he committed an offense at a certain time, in 1924, and he says no,

and then the Government doesn't show later by competent evidence that he did commit you will not consider that question.

170 Mr. St. Lewis: I would be going into a collateral matter if I asked a witness a question and he answered it. That is a collateral matter and I am precluding [precluded] from impeaching that witness. Here is the idea, I want to make myself clear. Next Monday, a week from today, I have to appear in Denver in a case. I proved that the man robbed a box car. I proved that in the same week he robbed another box car. Judge Cotteral admitted that saying it was in the same week and that was a matter to show intent and knowledge.

The Court: Do you contend you did not ask this witness that question?

Mr. St. Lewis: I did not. I couldn't ask the defendant, because that was a different offense in 1924. I could not have asked it and I didn't ask it.

The Court: If you didn't ask the question then there is nothing before the Court.

Mr. Wagoner: Let me get the matter straight. The matter arose upon the question that I objected to as to form of proving reputation. Counsel on the other side asked the witness Mathey, whatever his name was, if he knew the reputation of McBoyle. I objected to the question and the Court overruled me. Now he went ahead and he testified he did and he said it was good. Under the law, that is all the further that counsel on the other side had a right to go,
171 but they went further, they threw the bars down themselves. They asked Mathey if he is a member of the Committee of the Chamber of Commerce and didn't make an investigation of McBoyle before he went to Iowa. Now then, Mr. St. Lewis on cross examination asked him if he had investigated him as to his acts in 1924.

Mr. St. Lewis: I never asked the defendant. I couldn't prove it because that is collateral to this case.

The Court: If no such question was asked the defendant —you gentlemen will remember that you are the sole judges of the facts—if no such question was asked the defendant there is nothing before the Court on that point, but as to the witness Mathey, I think the Government asked him if he knew of some offense that had been committed by the defendant. The witness said no, and later the Government did

not show by competent evidence that offense had been committed. You will disregard that question by the Government's attorney. You are advised that there is no evidence before the Court and Jury from which you could infer that an offense was committed in 1924.

Mr. St. Lewis: The Court is right. I see the Court is under the impression I asked the defendant that, but
172 I didn't ask him.

The Court: I was under the impression counsel made that statement.

Mr. Milroy: The record is clear I think. I moved to exclude the testimony of A. J. Lacey, alias Pat Sullivan. I just want to repeat this so the record will be clear.

The Court: Motion overruled.

Mr. Milroy: Exception.

Mr. Milroy: On the ground first, that Lacey is a former convict and has confessed on the witness stand to the commission of a crime that involves fraud, and second that he is not corroborated by anyone, he being an accomplice, a self-confessed accomplice.

The Court: Overruled.

Mr. Milroy: Exception.

The Court: Now gentlemen, you will have an hour on a side to argue this case.

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173 Argument of the Case to the Jury.

Mr. Wagoner, who opened the argument on behalf of the Government, stated in part as follows:

If the Court please, and gentlemen of the Jury: It shall not be my intention to take up a great deal of your time in this case. There is nothing complicated about it. It is a case similar to a man going out here and stealing an automobile, and getting into an automobile—

Mr. Milroy: That is objected to. It has nothing to do with stealing anything. It is the transportation of a motor vehicle in interstate commerce.

The Court: I didn't get counsel's statement.

Mr. Wagoner: I haven't finished yet. I would like to

make a plain statement to the jury as to the evidence, if I may have it.

The Court: What did counsel say?

(Thereupon, the opening statement above was read by the court reporter.)

Mr. Milroy: That is what I objected to. This has nothing to do with the theft of a plane. Your Honor ruled on that matter. The gist of this offense is the interstate transportation of a stolen plane.

The Court: Overruled.

Mr. Milroy: Exception.

174. * * * * * * * * * * * * *

Gentlemen, is there any question in your minds as to the guilt of this defendant? No. There can be none under this evidence. Call to mind the straight-forwardness with which young Lacey gave his testimony. True, the boy committed a crime. True, he has probably committed several others up there, but listen, this man is older, look at his eyes, look at his expression, observe him; you observed his demeanor when he was on the witness stand the other day, observe that disposition that he showed when Mr. Lewis asked him the question, and he said, "that is a lie." He didn't say it in a mild tone or in a voice like gentlemen speak one to another. No. There is the man that backed Lacey. There is the man that took that boy and made a criminal of him. There is the man that placed the boy behind the penitentiary bars. Lacey was man enough to confess he did wrong and paid the penalty and all we ask in this connection is that this man be made to pay the penalty along with him.

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175 Charge to the Jury.

By the Court: Gentlemen of the Jury: You have heard the evidence in this case and the arguments of counsel, and it now becomes the duty of the court to instruct you as to the law of the case.

This defendant and A. J. Steve Lacey are charged by indictment with the violation of the National Motor Vehicle Theft Act, which charges that on the tenth day of October, 1926, in Texas County in the Western District of Oklahoma, and within the jurisdiction of this court one William W. McBoyle and A. J. Steve Lacey, alias Pat Sullivan, whose more

full, true and correct names are to the grand jurors unknown, then and there being, did then and there unlawfully, knowingly, willfully and feloniously transport, and cause to be transported in interstate commerce, that is to say, from Ottawa, in the State of Illinois, to Guymon, in the Western District of Oklahoma, a certain motor vehicle, to-wit: one Waco airplane, Motor No. 6124, Serial No. 256, which had theretofore been stolen from the owner thereof, the United States Air-craft Corporation, a corporation created and existing under and by virtue of the laws of the State of Illinois; they, the said William W. McBoyle and A. J. "Steve" Lacey, alias Pat Sullivan, then and there well knowing the said described motor vehicle to have been stolen, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Now the indictment, gentlemen of the jury, is merely the legal statement of the charge made by the government.
176 It is not evidence and will not be considered as evidence by you.

To this indictment the defendant pleads not guilty, the defendant Lacey having heretofore pleaded in this case, and his case having been disposed of, is not on trial, but the defendant McBoyle enters a plea of not guilty and by that plea denies all of the material accusations of the indictment and puts the government upon its proof and to establish his guilt by the evidence beyond a reasonable doubt.

As in all criminal cases the defendant is presumed to be innocent and that presumption remains with him throughout the trial and as a sufficient protection until it is overcome by competent evidence and his guilt is established and made out thereby beyond a reasonable doubt. If, after considering all of the evidence you entertain a reasonable doubt of his guilt it will be your duty to acquit him. The government has the burden of proof to establish the guilt of the defendant on trial beyond a reasonable doubt. That does not mean beyound all possibility of innocence or to an absolute certainty, but beyond a doubt that is reasonable in the minds of the jury due to the evidence or the want of evidence in the case. You must be satisfied to the extent that a reasonably prudent man would require before acting or deciding in his most important affairs. If, after considering all of the evidence, your minds rest satisfied and you have an abiding conviction that the defendant is guilty and are morally certain of it, then that would be proof beyond a reasonable doubt, and if you find him guilty

to that extent it will be your duty to convict him; otherwise to acquit him.

177 The law which the defendant is charged with having violated is as follows:

"This section may be cited as the National Motor Vehicle Theft Act. The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails; the term 'interstate or foreign commerce' shall include transportation from one state, territory, or the District of Columbia, to another state, territory, or the District of Columbia, or to a foreign country, or from a foreign country to any state, territory or the District of Columbia. Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both. Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The section of this statute relative to transportation is the section which the government charges the defendant with having violated. That is, that he caused to be transported in interstate commerce a motor vehicle knowing the same to have been stolen. It is true that the term airplane is not used in this section, but you are instructed the term airplane is included in the term motor vehicle as used in this statute.

In order for you to find the defendant guilty as charged in the indictment it is necessary that you find first that the airplane transported was a stolen airplane, and second, that the defendant knowing said airplane to be a stolen plane procured his co-defendant Lacey to transport said plane
178 from the State of Illinois to Guymon, Oklahoma. If the government should fail to prove either of the above propositions then it will be your duty to find the defendant not guilty.

You are instructed, gentlemen of the jury, that the indict-

ment charges that the airplane was stolen from the United States Aircraft Corporation, while the evidence shows it to have been stolen from the United Aircraft Corporation. The Act which I have heretofore read does not make it the duty of the government to state from whom the motor vehicle was stolen, and you are advised that in this case it is not necessary that the indictment state from whom the airplane was stolen, and if it does so state and incorrectly states the name of the owner that does not affect the indictment and you will disregard it.

The witness Lacey was confessedly an accomplice to the commission of the this offense. Notwithstanding, the government was entitled to call him as its witness and his testimony is competent for your consideration. The fact that he has been convicted of a crime and served a term in the penitentiary does not of itself make him an incompetent witness, but you will take all of those circumstances into consideration in determining the weight and credibility you will give his testimony. In the prosecution of a criminal case the government must select its witnesses from those acquainted with the facts,
and no criticism of the government can be indulged in
179 because a Government witness has been convicted of a crime, but that fact only goes to the weight and credibility of his testimony. With reference to Lacey's testimony, it is the law that an offense may be established in this court solely on the testimony of an accomplice without corroboration if the jury believes it. However, it is your duty to examine that testimony with great caution and scrutinize it carefully before placing reliance upon it, and in passing upon it you will look particularly to see whether and how far it is corroborated by credible testimony and by the circumstances in the case, and whether you consider he has any motive actuating him to give other than truthful testimony. If you believe Lacey's testimony you will give it such weight as you think it is entitled to receive in the case; otherwise, you will disregard it.

The following requested instructions are given. Instruction No. 4 requested by the defendant:

"You are instructed that by the testimony of A. J. Lacey, he has confessed to the commission of the crime charged in this indictment. That makes him an accomplice and his testimony must be viewed as such. You must examine his testimony most cautiously and unless you are convinced beyond a reasonable doubt that in considering all of his motives in the

case his testimony is true, in connection with all the other evidence in the case, then your verdict must be not guilty."

Requested instruction No. 5 by the defendant:

180 "The jury is instructed that the indictment in this case charges the defendant with transporting an airplane from Ottawa in the State of Illinois to Guymon in the Western District of Oklahoma knowing the same to have been stolen, and in this connection you are instructed that unless you believe from the evidence in the case beyond a reasonable doubt that the defendant William W. McBoyle instructed and directed his co-defendant A. J. "Steve" Lacey to go to Ottawa and steal and carry away said plane, and the said Lacey did in fact steal and carry away said plane, and that the defendant, William W. McBoyle had knowledge of such fact at or prior to the time said plane left his airport at Galena, Illinois, that your verdict must be one of acquittal. If, on the other hand, you find beyond a reasonable doubt from the evidence that the said defendant, William W. McBoyle, did instruct the said Lacey to go to Ottawa and steal said plane, and if he knew said plane was stolen at the time said Lacey arrived at the airport of the defendant at Galena, Illinois, and that said defendant ordered and aided Lacey in transporting the plane from Illinois to Guymon, Oklahoma, then your verdict should be one of conviction."

Instruction No. 6, requested by defendant:

"The jury is instructed that in order for you to find a verdict of guilty in this case you must believe from the evidence beyond a reasonable doubt that the said defendant McBoyle was instrumental in the transportation of said plane from Ottawa in the State of Illinois to Guymon, Oklahoma; that he knew said plane was stolen, and that his knowledge of such theft occurred prior to the time said Lacey left the air-
181 port of defendant at Galena, Illinois, and in this connection you are advised that if you find from the evidence that the defendant did not know the said plane was stolen at or prior to the time it left his airport at Galena, Illinois, but he learned thereafter when said plane was in transit to Oklahoma, or prior thereto, that said plane had been stolen that such knowledge of the theft would not support the charge in this case and your verdict should be one of acquittal."

By the Court: Relative to the circumstantial evidence that has been introduced in this case. An offense may be shown by circumstantial evidence, and that is legal evidence, but the circumstances in the case must be consistent only with the

guilt of the defendant and inconsistent on any other reasonable hypothesis. In other words, that must be the only reasonable explanation of the evidence, that the defendant is guilty.

You are the sole judges of the facts in the case, and you alone must be depended upon to pass upon the weight of the evidence and the credibility of the witnesses. You will consider how they have impressed you upon the witness stand, the interest, if any, they have in the result of the trial and whether their testimony is reasonable or not; how they have recalled or failed to recall the material facts which they have testified to, and you will consider all of the facts in the light of the estabished facts and circumstances.

Now, gentlemen of the jury, just briefly with reference to the evidence in the case. As indicated, you are the sole
182 judges of the facts. The arguments of counsel if they are of service to you can be used in arriving at a determination of your verdict, but you are at liberty to pay no attention to the arguments of counsel if you want to. You can disregard any suggestion that the court may make to you relative to the facts. You are the sole judges of the facts in the case and that province cannot be invaded either by the court or by the attorneys. You are the ones who are to determine whether the witnesses have testified to the truth, and whether or not the evidence which they have given is sufficient to justify you in rendering a verdict of conviction or acquittal. The two theories in this case I feel I should briefly state to you. It is the theory of the government that the defendant Lacey was employed by the defendant McBoyle to go and steal this particular airplane and then to take it to Amarillo, Texas. The testimony of Lacey is that he went at the request and suggestion and as an employee of McBoyle; that he got the airplane; that he brought it back to McBoyle's place of business; that he advised McBoyle what he had done; that then he left Galena, Illinois, and brought the plane to Guymon, Oklahoma; that he stopped there because he saw a big crowd, and he thought it would be a good place to make some money before going on to Texas. That would complete the offense if that statement is true. It is really immaterial what took place thereafter insofar as the commission of the offense is concerned.

On the other hand it is the theory of the defendant McBoyle that Lacey never was employed by him except on a com-
183 mission basis. The testimony of the defendant is that he never did direct or suggest to Lacey that he go and

steal this particular plane and he had no knowledge of it; that he never knew it was a stolen plane until after Lacey had left Galena; that he supposed that Lacey had this plane with permission from the owner or that he owned it, and that he was making this trip on his own responsibility. If the statements of McBoyle are true and if you believe those statements there isn't anything for you to do but to acquit him.

Now, gentlemen, it largely resolves itself into a situation of whether you believe the testimony of the defendant McBoyle, or whether you believe the testimony of Lacey. It is an unusual case, but the same elements of human nature are involved in it. You may take into consideration the motive Lacey had or would have had for testifying as he has testified if it is not true. You may take into consideration all of those facts. You may take into consideration the fact that he had stolen planes before and admitted it; that he served two sentences in the penitentiary. On the other hand, you can take into consideration the interest that this defendant has in this case. If he is guilty, what naturally would be his position on the witness stand? If he is innocent what would be his position? Now you have seen all of the witnesses on the stand. You have heard their testimony. You have observed them and you are the sole judges of their testimony.

One instruction I should have given you is, that under the Federal law there is no such thing so far as punishment
184 is concerned as a principal and accessory. The individual who aids in the commission of a crime becomes a principal, and if you believe in this case that McBoyle procured or employed the defendant Lacey to transport this plane then the defendant McBoyle would become a principal in the commission of the offense to the same extent that Lacey would. Is there anything further, gentlemen?

Mr. Brown: I would like to request an instruction that the telegrams in the case constitute circumstantial evidence.

The Court: The telegrams that have been introduced are circumstances that you may take into consideration. To a certain extent they are positive testimony in that the defendant McBoyle testified that those were in substance the telegrams sent and received, but as to their interpretation, you are the sole judges as to that, and those are circumstances which come under the definition that I have given you of circumstantial evidence which you may take into consideration in determining the guilt or the innocence of this defendant. Is there anything further?

Mr. Brown: And I think the rule regarding consistency should apply to these.

The Court: Yes. The same rule will apply as I gave you as to circumstantial evidence. In other words, that the circumstances must be consistent with the guilt of the defendant alone and nothing else. If you can justify those on some other reasonable hypothesis then it is your duty to do so.

Mr. Milroy: I have a suggestion or two. I think that your honor alluded in his instructions to the jury that this
185 crime if there was a crime committed in this case could be prosecuted either in the northern district of Oklahoma or western district of Oklahoma.

The Court: No, I didn't state that. I will state, gentlemen of the jury, that this court has jurisdiction to punish this offense under the Act as I have read it to you, and any other Federal District Court in any state through which the plane passed after leaving the state of origin would have jurisdiction, and the State of Illinois, the place of origin, would have jurisdiction.

Mr. Milroy: May I say in the way of exception, assuming that the defendant did pass through. I think the instruction assumed that the defendant passed through some state.

The Court: Assuming that the defendant Lacey passed through another state from Illinois to Oklahoma. I didn't mean that the defendant physically passed through those states.

Mr. Milroy: We except to the question that the district attorney propounded to Mr. Mathey. I think you covered that this morning and the jury was present.

The Court: I think the jury thoroughly understands that.

Mr. Milroy: There is one other suggestion I would like to make, and that is, that if from all the evidence it can be reconciled with the theory of innocence of the defendant the jury must so consider it.

The Court: I have no objection to that instruction. You may consider that, gentlemen, if after taking into consideration all the evidence in the case you can conclude from
186 that evidence that the defendant is innocent it becomes your duty to do it because that would be a reasonable doubt. You must give the defendant the benefit of the reasonable doubt and your conclusion must be reached beyond a reasonable doubt as I have defined reasonable doubt to you.

The Court: Instructions Nos. 1, No. 2, No, 3 are refused and exception allowed.

(Thereupon, a bailiff is sworn, and the jury retires to consider its verdict.)

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187 The following instructions were tendered by the defendant, and refused, and exceptions allowed.

"Instruction No. 1.

The court instructs the jury that it was not necessary for the government to allege in the indictment the ownership of the motor vehicle, which the indictment charges was stolen and transported in interstate commerce, but you are instructed that in this case the government did allege that the motor vehicle in question belonged to the United States Aircraft Corporation, a corporation existing under and by virtue of the laws of the State of Illinois, and, having so alleged said ownership, you are instructed that the government must prove beyond a reasonable doubt the existence of the United States Aircraft Corporation, that it was a corporation organized and existing under and by virtue of the laws of the State of Illinois, and that said corporation did in fact own said motor vehicle."

Refused. Defendant excepts.

Instruction No. 3.

The court instructs the jury that it is not necessary for the government to allege in the indictment the ownership of the motor vehicle, which the indictment charges was stolen and transported in interstate commerce, but if the indictment does so allege such ownership, as it does in this case, before you can arrive at a verdict of guilty you must be convinced beyond all reasonable doubt that the ownership of the motor vehicle as alleged is proven, otherwise your
188 verdict must be not guilty.

Refused. Exception allowed.

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189 Transcript of Proceedings on Motion for New Trial.

Now, on this 29th day of June, 1929, the above entitled cause comes on for hearing on a motion of defendant Wm. W. McBoyle for a new trial.

Harry F. Brown, Esquire, appeared for the defendant; and Roy St. Lewis, Esquire, United States Attorney appeared for the Government; whereupon the following proceedings were had:

Samuel W. Bergman was called in person as a witness, in support of defendant's motion for a new trial, and testified as follows:

My name is Samuel W. Bergman; I live at Galena, Illinois; have lived there 49 years; my trade is carpentry; have worked at it for 30 years.

I worked for Mr. McBoyle in 1926; started early in the summer, about the early part of June, and worked until cold weather. I worked pretty near steady during that time. I built a 50 by 60 addition to the hangar, built an office and remodeled his cottages, and painted all of them.

I was working there in the early part of 1926; I saw Mr. Lacy around there considerable during that summer. I recall the meeting between Mr. McBoyle and him and a mechanic, a little short fellow they called Frank; did not learn his name. They had an argument about wanting to fly one of Mr. McBoyle's planes one day and teach this fellow
190 about flying. I heard McBoyle say "No, you can't use that new Wacco [Waco], take that big one there, repair it and teach him with that." "You can't take that off the ground," he says. "It is up to you then." "You are not going to crack up my new one. They got pretty hot around the collar, both of them, and I heard McBoyle order them off the place, and I paid no more attention.

I do not think Lacey and the mechanic left until evening. I think the mechanic left first, and I think the next evening I saw Lacey down town. I never saw anything more of him until about a week or ten days after; I was out at the air port, about seven, and pretty soon I heard a plane and Lacey got off and run over to me. He says "Where is Mac." I says, "Mac is in bed I guess, he is sick." I saw nobody but a mechanic, John Simmons and Lacey. McBoyle hollered from the door to gas this fellow up and get him off the place.

Q. State whether Mr. McBoyle ever came about the planes while Lacey was there.

A. No, Mr. McBoyle never left the platform because I was no further than from this court room from the plane at any time. I was working on the new hangar right near the oil station.

Q. Did the plane stay there in your presence or your sight during this time.

A. It wasn't out of my sight; couldn't get out of my sight because I was working right out in the open. The filling station was just about twenty feet from the corner of the new hangar.

Q. How long do you think Lacey was there with this plane?

191 A. From the time he come and asked me if Mack was in until he spoke to me when he left, I should judge about twenty-five or thirty minutes.

Q. Did you see anybody appearing to be changing numbers or repairing any portion of this plane?

A. No, the only thing I seen done was John Simmons putting in gas.

Q. Did McBoyle have a man by the name of Smith working for him also?

A. Yes, he was most of the time in the downtown garage.

Q. Was Smith there that morning?

A. No, sir, I never seen him if he was.

Q. Now, were the circumstances such that Mr. McBoyle or anybody else could have come around the plane there in your presence and filed off the serial numbers and hammered new numbers in there with dyes [dies]?

A. They couldn't get by with it without me seeing them if there was anything of that kind done. There was only two around the plane. Mr. McBoyle wasn't around the plane while it was there.

Q. You were in sight of the plane all of the time?

A. I wasn't over forty feet from the plane at any time.

Q. You mentioned a man by the name of Rokus. Who was he?

A. He was Lacey's mechanic.

Q. How much was he around there that summer?

A. Well, he was around there whenever Lacey was around there. I never saw him doing much of anything.

192 Cross Examination.

I never saw anybody load the plane with whiskey; I seen several packages carried in; couldn's [couldn't] say what they were. Lacy [Lacey] carried the packages over and Simmons handled them. I couldn't say how many packages there was; I think he went over twice, and got the packages. Couldn't say that they hauled whiskey at that air-

port; I never seen any, there; I would have drank it if I could have got it. Witness excused.

William F. Bollinger testified in support of motion for a New Trial, as follows:

My name is William F. Bollinger; I reside now in Oklahoma City; am employed as co-pilot for the Universal Air Lines, running between Oklahoma City and Tulsa.

I am acquainted with Mr. McBoyle; have known him for the past six years where I was in his employment, and at Dubuque, Iowa, where he has been for the past year. Was in the employment of Mr. McBoyle during the year 1926, from approximately June 18th, to August 15th.

Q. During that time what were your duties.

A. My duties when I first came on to the field was to take complete charge of all the ground operations, as I was not a pilot at that time; Mr. McBoyle was in ill health that year.

Q. During that time did you know a man by the name of Lacey?

A. Yes, sir.

Q. What did Mr. Lacey have to do about those planes?

A. Between June 18th and July 2d I had seen the gentleman a year or so before that, but had never seen him
193 around the planes at that time. Approximately along July 2d, he came there flying a Thomas-More Scout with a five motor, and left the plane there with order that it be worked on. I worked on the plane and serviced it and kept accurate account of all that was done there just as though it had been an outside plane.

Q. What did he do around the planes when he was there?

A. Later on he assumed—he seemed to—there was some deal made in regard to handling out of town business, as Mr. McBoyle was in ill health and was unable to take care of the out of town business. He was making contracts throughout the country and dealing on his own hook, it seemed like on a commission basis.

Q. What planes did he fly?

A. About the middle of the month Lacey left there and came back with a Wacco [Waco] Nine—

Mr. Lewis: The question was, what planes did he fly. Just answer the question.

Q. Mr. Brown: Then what did he fly?

A. He didn't fly anything. He wasn't around there very much until about the 15th of the month, July.

Q. What did he fly after that?

A. After that he brought a Waco Nine.

Q. What, if anything, was said about this Waco Nine? Whose it was?

A. It was the general understanding around the field the Waco Nine came from the field he had part ownership in, Niles, Michigan.

Q. And state what was done with this plane?

194 A. He controlled everything about that plane. I never even worked on the thing.

Q. What did he do with that plane during the rest of the time you were there.

A. He barn-stormed around the country, carried passengers at various little towns in the surrounding territory and made contracts for exhibit work.

Q. For how long a period did that continue?

A. That continued while I was at the field—that continued until August 15th, and after that he was still doing it in September.

Q. Did he fly Mr. McBoyle's planes in this work, he was doing during the period he had that plane there?

A. No, sir, not while I was there.

Q. Did Mr. McBoyle fly his plane? A. No, sir.

Q. He did some flying at the field there did he, flying passengers for Mr. McBoyle's port?

A. He flew the ship that was supposed to be his own there on Sundays or whenever Mr. McBoyle wasn't feeling well, and carried passengers. I kept account of the number of passengers he carried.

Q. How long a time, did he spend, or how much of his time away from the field during that summer?

A. He spent so much of his time that Mr. McBoyle thought he was neglecting the field there for out of town business.

Q. Now what did you have to do with any of the work Mr. Lacey had at other places?

A. Whenever he wanted me at other places he came
195 to me personally and made a contract with me.

Q. Just explain what that contract was; what were you doing with him?

A. At that time I was doing considerable exhibit work.

Q. What do you mean by that?

A. I mean wing-walking and amusing the public, parachute jumping.

Q. Did you make some arrangement with Mr. Lacey on that?

A. Mr. Lacey came to me and made arrangement with me to make a parachute jump at Dyersville, Iowa. I believe the date was August 14, 1926. Through some reason or other, owing to the crowd on the field, it was cancelled, and Mr. Lacey paid me personally on the cancellation of the contract.

The first plane I mentioned he had there was sold by Lacey; it was the general understanding it was sold by Lacey to Ed. Jungworth. I know the plane was sold to Ed. Jungworth; I know I helped assemble that ship, and was given what you might term as a tip for my labor there on it by Mr. Jungworth. That was the Thomas-More Scout. It was there about three weeks. I saw Mr. Jungworth fly the plane from the Galena airport.

I worked for Mr. McBoyle on a straight salary; Mr. Bergman was working that way and Smith and John Simmons was working that way. We got our checks Saturday evening. Mr. Lacey never appeared to get checks at the same time; never appeared to get pay checks by the week. He always had money he was getting from his passenger business and he seemed to be controlling his own money. Mr. McBoyle did not give him directions as to what to do; he was not in charge of the field; he never exercised any authority
196 over the field. He exercised his authority over his own private business and his own ship.

Frank Rokus was the name of his mechanic. He came there about the middle of July; he was there until after I left. Rokus was not working for McBoyle. He was connected with Lacey.

Cross Examination.

I was not there October 10, 1926; I know nothing about the stolen plane. When Mr. McBoyle wasn't feeling well, Mr. Lacey would take his own ship and fly it and kept accurate account of the passengers that he carried.

During the trial of this case I was in Wichita Falls, Texas, and knew nothing of the case. I did not find out that there were men down there looking for me on the part of the

government. I knew nothing of this case being tried until I was in Wichita Falls, Texas, and picked up a newspaper and saw where McBoyle had been convicted, and I voluntarily wired Mrs. McBoyle that my services were at their disposal. I did see Mr. Lacey at Oklahoma City, but I knew nothing of what Mr. Lacey was doing down there. I wired Mrs. McBoyle because I thougth it was an injustice.

Q. Why did you wire Mrs. McBoyle when you saw this man was convicted when you knew that you were not at the port on October 10, 1926, when the plane in question was stolen? Why did you do that?

A. Because, knowing Mr. Lacey as I do and knowing his reputation, and knowing things had gone the way they had and Mr. McBoyle, I did not feel he was guilty of this theft.

I saw Lacey at Oklahoma City. He did not tell me this case was on trial; nothing was said about McBoyle.

Witness excused.

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197 The affidavit of J. H. Simmons was introduced in support of Motion for new trial, which, in substance, is as follows:

My name is J. H. Simmons; I reside at Galena, Ill., where have lived six years, and have been employed at automobile and airplane mechanic.

Began work with Mr. McBoyle of Galena about June, 1925, as a mechanic; spent part of time at airport, and part at garage; airport is two miles north of Galena; during 1926 and 1927 my duties were at the airport almost all the time.

I knew A. J. Steve Lacey, having become acquainted with him at the McBoyle Airport, the latter part of June. Lacey had a T. M. Scout known as a Yackey sport on the field.

Around the 2d or 3d of July McBoyle let Lacey take his standard plane to Sheridan, Ill., to fly; it was reported that he cracked the machine; he came back and told me how the damage to the standard happened; hot [that] it was the fault of the gasoline, and he brought a can of it with him. McBoyle had two new planes, but after Lacey cracked the Standard, he refused to let Lacey use the Waco's; I never saw Lacey drive one of McBoyle's planes after he cracked up the standard. He wanted to, and they had considerable trouble about it.

Lacey brought down a Waco 9 plane that he said was his. He flew this Waco ship from McBoyle's field a number of times; he would also leave with the ship quite often and come back after a few days. On one occasion he left and when he came back the rudder was broken. I tried to help him repair it. Mr. McBoyle had a new Waco standing idle, and Lacey and I took the rudder from that ship and replaced the
198 broken rudder on Lacey's ship. The This rudder happened to have McBoyle's name on it. We did not ask Mr. McBoyle about putting it on, and he criticized me severely for taking the part from his new plane and putting in [it] on Lacey's. Mr. McBoyle was agent for Waco planes at Galena.

Later Lacey took the Waco 9 that he had brought to the field away, and came back later flying a T. M. Scout, rotary motor.

Mr. McBoyle sent a truck to Sheridan, Ill., to get the Standard plane that Lacey had cracked up; it had never been repaired; I found it pretty badly damaged; Lacey had agreed with McBoyle to fix the standard; and he and his mechanic Frankie Rokus, a mechanic Lacey brought to the field to work for him personally. He was there several weeks and worked for Steve.

After Lacey disposed of his Waco and got the T. M. Scout, he again wanted to fly McBoyle's Wacos; he also wanted his mechanic Rokus to fly them to get credit for flying time; McBoyle refused to let let him do this, and they had a quarrel over it, so Rokus told me. I was not there. Rokus said he and Lacey were leaving, he shook hands with me; the next I saw was him and Lacey with Lacey's Overland sedan ready to leave town. Lacey came back to Galena a few days later; I saw him take Mrs. Lacey to the train; he told me he had sold his car and was leaving; Lacey stayed at Mrs. Smith's place, across the street from the garage. I do not believe Lacey was over at the Airport the day he left, after he sold his automobile, as I saw him at various times, and he had no way to go out.

The next morning I was at the airport, and about nine o'clock Lacey flew in, and landed down near the gas station. I was at the soft drink stand; he got out of the plane, and asked me to check the oil, and fill the machine with gas; he had a new looking Waco.
199 Lacey went away from the machine; I went into the office and figured up the gas and oil; it amounted to near $10, and when Lacey came out, he handed me a $10 bill, as I remember it, and I gave him a small amount of change.

At the time Lacey was there, there was a carpenter by the name of Bergman working on the hangar. Mr. McBoyle was feeling badly and was in the camp house; he was never about the plane, and never came out of the house; Lacey was there perhaps three-quarters of an hour. Just before leaving Lacey placed a suitcase and a couple of other packages in the plane, got in and started away. Lacey never left the airport while he was there with the plane, and Smith, the other mechanic was not there at the time.

I was noat [not] at the airport so much as winter came on, but nothing occurred to indicate that Lacey was working for McBoyle. I am positive there was no such arrangement.

J. H. SIMMONS.

Subscribed and sworn to before me this 13th day of June, 1929.

SAMUEL J. HUGHLETT,
Notary Public.

Affidavit of John McBoyle, in substance is as follows:

My name is John McBoyle; I am sixteen years old, and reside with my father and mother, Mr. and Mrs. W. W. McBoyle, Dubuque, Iowa.

I was around my father's airport just North of Galena, Ill., most of the time when A. J. Lacey was there during the summer of 1926.

The first time I saw the man I know as Lacey, he had landed and had a Yackay Sport ship; the next time I saw him, he came in with a T. M. Scout, with the name of Eagle Airport, Hinckley, [Hinkley] Ill., on it; after that I remember he took our Standard ship down to Sheridan, where he cracked up, and then he came back in an automobile. He then brought a Waco to the field, after that he was gone most of the time flying the Waco until he sold it at Minneapolis.

At the time Lacey appeared at the field with the Ottawa ship, on October 6, 1926, I was in bed; I was just ready to get up and got up and went out; Simmons was out there and I heard him tell him to gas up the ship. I turned the crank for Simmons and he put in the gas and made up a bill. Lacey had gone in the house while we were putting the gas in the ship. I do not remember whether we put oil in or not. The carpenter Mr. Bergman was working on the hangar or on the roof

of the house. I do not believe Lacey was there more than a half or three quarters of an hour. I know that he left before I started to school.

My father had been sick in bed for two or three weeks; he was only partly dressed, and did not have his shoes on. He never came out to the plane while Lacey was there.

I remember when Lacey left he put in a suit case, and some packages. I saw Simmons give Lacey the bill, but I do not remember that I saw him pay it. I do not remember anything he said when he left.

Dated this 19th day of June, 1929.

JOHN McBOYLE.

Subscribed and sworn to before me this 21st day of June, 1929.

M. E. LINK,
Notary Public.
Dubuque County, Iowa.

Affidavit of H. H. Smith,

introduced in support of motion for new trial is in substance as follows:

My name is H. H. Smith; I reside at Galena, Ill. where
201 I have lived for five years; am an automobile mechanic; was employed by W. W. McBoyle for almost three years; was working for him during 1926, my work being divided between the garage in Galena and the airport, north of town.

During the spring of 1926 a man by the name of Lacey came to McBoyle's airport; later he and his wife roomed at our house; kept the room during the summer.

During the summer I saw Lacey have a T. M. Scout, a Waco with his name on the cock-pit, and a toary [rotary] motored Scout plane. While he had the Waco plane with his name on it, he flew it a great deal; I saw him fly the Standard plane of McBoyle's, but after he cracked it up, McBoyle refused to let him have his planes for flying. He brought a mechanic to work on his ships who went by the name of Frankie Rokus, who also went by the name of Mitchell.

Along early in October Lacey and his wife told my wife that they were going to leave; Lacey sold his car and the day Mrs.

Lacey left, he asked me for my car to take her to the train. When he brought the car back, he told me good-by.

I was not at the airport on October 6th when Lacey came in with the Waco ship, and I did not bring Lacey to Galena to cash a check then or any other time.

I never saw Lacey but a few times after he quit rooming at my place in October; I was at the airport occasionally during October and November, but never saw anything to indicate Lacey was working for McBoyle.

At the time of Lacey's trial in Indianapolis, the Government subpoenaed me as a witness. While we were waiting for Lacey's case to come up, Lacey came to me and after talking
202 for a while, he began talking about his case; he pretended that I had given him a check out of the cash register at McBoyle's garage each week for work; I had never on any occasion given him a check of any kind out of the register, and Lacey knew as well as I that I had not; but he pretended I had, and wanted to make me remember about it to testify for him on that point. He also tried the same scheme on what he called a $900. check which he claimed I saw him deliver to McBoyle, and wanted me to remember it and so testify. I knew nothing of any such check, and he knew I did not.

I never at any time gave Lacey a check from the cash register, nor did I ever see Lacey receive a check when the others were paid.

(Signed) H. H. SMITH.

Subscribed, etc.

Affidavit of Sylvia Smith

introduced in support of the Motion, is in substance as follows:

I reside at Galena, Ill., where my husband H. H. Smith and I have lived for the last five years; in January, 1924, my husband began work as an automobile mechanic for W. W. McBoyle, and worked for him until about two years ago. In the spring of 1926 a man by the name of Lacey came to Galena; he was a flyer and did flying at the McBoyle airport. In this way I became acquainted with A. J. Lacey and his wife Homera Lacey. We had an extra room * * *. They decided to take it; * * *. They kept the room all summer, leaving their things there.

Along about the first of October, 1926, Mrs. Lacey told me that Mr. Lacey was out with McBoyle, and they had had trouble. Soon after she told me that Lacey and a man by the
203 name of Mitchell, who was supposed to be Lacey's mechanic, left in Lacey's Overland sedan and were gone a couple of days; when they came back the car was covered with mud, and we made considerable comment about it. After the return from this trip they got ready right away to go; I think they only stayed a day or so. One evening they (Mr. and Mrs. Lacey) quarrelled a lot in their room; the next morning they continued the quarreling until about ten o'clock. Lacey came out and stated they were all through around here and were leaving town. They had told me they were trying to sell the car, and they sold it on the day they left to a Mr. Day of Galena. Mrs. Lacey left on the 12:30 train of the day they sold the car. Mr. Lacey took her to the train in my husband's car. During the morning they were in and out of the house packing and getting ready to go. Mr. Lacey was there most of the time. After Mrs. Lacey left, Mr. Lacey came back to the house and said he had sent his wife away; he asked if it would be all right if he left his grips there, and that he would be back that night or in the morning. He left the house around one or one-thirty; our home is in plain sight of the depot, and quite near. I was in the kitchen and saw Mr. Lacey walk across the tracks and get on the stubb that leaves Galena about 1:35, which meets the Chicago trains at Galena Junction. I feel sure Mr. Lacey never spent any time at the airport on the day he left; they came out of their room late, and were busy packing and getting ready to go until he left. The next day Lacey came back to our house about nine o'clock, in the morning, got his grips, and left.

The next I heard of Lacey he was in trouble over the Ottawa ship. I live near the McBoyle garage, and was there quite often with my husband, but never saw Lacey there again.

SYLVIA SMITH.

Subscribed and sworn to before

JOS. T. HUSSEM,
Notary Public.

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204 Affidavit of J. T. Day.

introduced in support of Motion for New Trial, is in substance as follows:

My name is J. T. Day; I reside at Galena, Ill., where I am engaged in operating an oil station; have lived in Galena

about 13 years. During the summer of 1926, I became acquainted with A. J. Lacey, at my station, where he purchased oil from time to time; my acquaintance was casual only.

About the last of September, 1926, he offered to sell me his Overland sedan, the 1926 model. We had some conversation about the matter at that time, but came to no agreement. About a week later he came to my station and wanted to know if I still wanted to buy his automobile. * * * After some conversation I decided to buy it at $350, which he accepted. I gave him $150. in cash, and a check for $200.00; he also gave me a receipted bill for the payment, photographs of which are attached to this affidavit. He left the car with me at that time. * * * He stated that he would not sell it but that he was going to California. Mr. Eustace a rural mail carrier was present at the time I made the trade.

J. T. DAY.

Subscribed and sworn to before Joseph M. Nack, Notary Public.

The following is a copy of check given by J. T. Day to A. J. Steve Lacey, on October 5, 1926, the day before the theft of the Ottawa plane, as shown by Day's foregoing affidavit, and introduced therewith.

"No. 407

Galena, Ill., 10-5-26.

Pay to the order of A. J. Lacey.....$200.00. Two Hundred and 00/100 Dollars.

First State Bank, Galena, Ill.

J. T. DAY.

Cash $150.00
Chk. 200.00

350.00

205 Copy of receipt signed by Lacey for payment for automobile, introduced with affidavit of J. T. Day:

Galena, Illinois; 10-5-26.

M J. T. Day

In account with Days Oil Station Wholesale Retail Hood Tires. Expert greasing service

Terms Telephone 139-R

Overland Sedan #Serial 91-A256656 #Motor 192710 $350.

Paid 10-5-26 A. J. LACEY.

Affidavit of R. J. Eustace,
submitted on Motion for New Trial, is in substance as follows:

My name is R. J. Eustace; I reside at Galena, Illi., where I am employed as a rural mail carrier.

During 1926 I was acquainted with a flyer by the name of Lacey. On October 5th, I happened to be at the oil station of J. T. Day in Galena. When I came up Lacey was there, talking with Mr. Day about selling his Overland automobile. After they talked for some time, they agreed upon a sale. I saw Mr. Day write out a check and hand it to Lacey; he took the check and left soon after.

ROY J. EUSTACE.

Subscribed and sworn to before Joseph M. Nack, Notary Public, this 12th day of June, 1929.

Affidavit of Milton P. Miller,
submitted on Motion for New Trial, is in substance as follows:

My name is Milton P. Miller; I reside at Dubuque, Iowa, where I am engaged in the out-door advertising business. In June, 1925, I was licensed as an airplane pilot, under F. A. I. Certificate No. 6237, dated June 27, 1925. In my flying I became acquainted with an aviator by the name of A. J. Lacey in 1926, having seen him around the McBoyle airport at Galena, and at Dubuque and other ports.

206 On October 1, 1926, I was driving from Streator, Ill., over to Ottawa, Ill., and stopped at the Ottawa flying field, to see Willard F. Bridgman [Bridgeman], with whom I was acquainted; as I drove up, I saw the Bridgman [Bridgeman] ship in the air, and being an aviator myself decided to stop and have a friendly talk with Bridgman [Bridgeman], and see how he was coming along with his new Company. I supposed Bridgman [Bridgeman] was in the ship. I waited for a few minutes for the ship to land, which it did a few moments later, and taxied up to the entrance to the field. I walked out to meet, as I supposed, Bridgman [Bridgeman], and hollowed "Hello, Bridgman [Bridgeman]!" There were two men in the ship, with goggles on, and I could not see who it was at first, but supposed it was Bridgman [Bridgeman]. As soon as the pilot crawled out of the ship, I saw it was A. J. Lacey flying the ship, instead of Bridgman [Bridgeman], but it was

Bridgman's [Bridgeman's] ship. I did not know the man flying with him.

I asked Lacey what he was doing flying Bridgman's [Bridgeman's] ship; and he said "Why, Bridgman [Bridgeman] has got his wind up, I guess, he wants a pilot." We talked a few minutes about things in general concerning aviation, and I drove on into Ottawa.

My first call at Ottawa was on my friend and Customer, Art Williams of the Williams Shoe Company * * * who I know to be a stockholder in Bridgman's [Bridgeman's] Airplane Co. * * * I remarked to Mr. Williams, or asked him "What was the mater with Bridgman [Bridgeman]," and he says "why nothing as I know of, I just heard the ship over town." I said I was just out there and a man by the name of Lacey from Galena was flying it." He says, I did not know anything about that, I will have to ask Bridgman [Bridgeman]. We then completed our business transactions and left.

207 A few days later, on my return to Dubuque, I received a long distance call from the Sheriff at Ottawa and the Sheriff says, "Our airplane was stolen down here, and Mr. Williams at the shoe store says you had seen a strange pilot flying it when you came through Ottawa a few days ago, and asked me for descriptions. I told him it was A. J. Lacey, and gave him a general description of the man.

At the time of Lacey's trial at Indianapolis, Indiana, in 1928, Lacey subpoenaed me as a witness * * * * he stated to me that if he got stuck at Indianapolis, "I will get McBoyle after I get out." Dated this 22d day of June, 1929.

MILTON P. MILLER.

Subscribed and sworn to before

M. E. LINK,
Notary Public.
Dubuque Co., Iowa.

Defendant introduced in support of Motion for New Trial, photostat copy of the Bank account of W. W. McBoyle, in the Galena National Bank, Galena, Ill., for October, 1926; the following extract shows the transaction in connection with his account for October 6, to 11th, inclusive (the purpose being to show that no check for $150. was cashed, as testified to by Lacey)

Date	Checks	
Oct. 5-26	5.05-	300.00-
Oct. 8-26	395-	
Oct. 11-26	237.45 1st.	

(Note: The photostat copy was accompanied by affidavits of S. J. Hughlett, Cashier of the Galena National Bank, of Galena, Illinois, and Leo T. LeBron, Jr., Photographer, as to its being a true photostat copy of the ledge [ledger] page of the account of W. W. McBoyle, for dates indicated)

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208 Mr. Brown: I want to offer in this part of the record a communication dated June 19, 1929, regarding Lacey, from W. C. Neville to Honorable Elmer Thomas, United States Senator.

(Thereupon, the said letter was received in evidence, made a part hereof, and is as follows:)

178815
ABA-fjm 19 June, 1929.

My dear Senator:

In compliance with telephonic request from your office this date, I am writing to advise you of the status of Private Arthur John Lacey, U. S. Marine Corps.

Private Lacey enlisted in the U. S. Navy on January 6, 1920 and was honorably discharged August 1, 1921 with character "good". He enlisted in the Marine Corps on November 17, 1921 and was discharged on September 11, 1923 at San Diego, Cal., with a bad conduct discharge pursuant to sentence of a summary court-martial. He reenlisted in the Marine Corps on February 15, 1926, on condition that he maintain a satisfactory record during a probationary period of six months. On June 4, 1926, while awaiting action for an unauthorized absence, he broke arrest and deserted from the Marine Barracks, Quantico, Va., and has since remained in desertion.

This man is amenable to trial by a general court-martial for desertion and upon his return to the Marine Corps it will be necessary to take such action.

209 With kindest regards, I am

Sincerely yours,

W. C. NEVILLE,
Major General Commandant.

Hon. Elmer Thomas,
United States Senate,
Washington, D. C.

Mr. Brown: I would like to offer in evidence the reward offered by T. C. Turner, Lt. Colonel, Marine Barracks, Quantico, Virginia.

(Thereupon, the said reward was received in evidence, made a part thereof, and is as follows:)

Reward.

Marine Barracks, Quantico, Va.
16 June, 1926.

A reward of Fifty Dollars ($50.00) will be paid for the delivery of the following described Arthur John Lacey, private, deserter at any Marine Barracks or Marine Corps Recruiting Station or such other place as the Major General Commandant may direct.

Absent without leave since 10:00 p. m., June 4, 1926, from Marine Barracks, Quantico, Virginia.

Born 28 April, 1901, at RS, Chicago, Ill.

Date of expiration of enlistment 14 February, 1930.

Height, 5 feet, 8 inches; weight, 158 pounds; eyes blue, hair black; complexion, swarthy; personal marks and scars, S. ½" above right eye; birth mark on left lip, lower; S. on left knee cap.

Former occupation, Commercial Aviator; name and address of next of kin, (Mother) Mrs. Arletta M. Lacey,
210 1227 Washington Ave., So. Minneapolis, Minn.

Remarks: Deserted at 10:00 pm June 4, 1926—when last seen wore full dress blues with white belt.

The offer of reward expires—(1) Upon return of the man to the service; (2) Upon his discharge from the service; (3) Twenty-two months from date of expiration of enlistment as stated above. Also, the offer of reward for a straggler expires upon issue of a deserter's reward.

If the man claims that he has returned to the service since the straggling or desertion indicated on this offer of reward, he should be able to present leave papers or his discharge.

The above reward shall be in full satisfaction of all expenses for arresting, keeping, and delivering the straggler or deserter.

In extraordinary cases only, where, by reason of the distance to be traveled, the amount of the above reward will not

compensate, transportation may be furnished, upon order of the Major General Commandant of the Marine Corps, to the civil officer from the place of arrest to the place of delivery, and the return of such officer, in addition to the reward. In such extraordinary cases a telegram should be sent to the Major General Commandant, Marine Corps, Washington, D. C., requesting instructions.

This offer of reward should be presented when delivering the man.

T. C. TURNER,
(Seal) Lt. Colonel, U. S. M. C.,
Commanding.

211 Fingerprint Classification

5	R	11	8
17	R	10	12

212 Affidavit of John H. Livingston introduced by defendant in support of motion for new trial is in substance as follows:

"My name is John H. Livingston; I reside at Aurora, Illinois, where I am President of the Mid-West Airways Corporation.

Sometime in October, 1926, the exact date of which I can not now remember, Mr. Willard F. Bridgeman, of Ottawa, Illinois, landed on my field, flying a Waco 9 belonging to W. W. McBoyle of Galena. Mr. Bridgeman and the other pilot stayed all night at Monmouth, leaving their airplanes at my field (I was then at Monmouth, Illinois).

The next day, Bridgeman proceeded on to Ottawa with his ship, and the pilot that had brought the McBoyle plane in, returned to the west, leaving the McBoyle plane at my hangar.

The evening of Mr. Bridgeman's arrival at Monmouth, as stated above, Mr. Bridgeman got in touch with the Sheriff of Warren County, Illinois, in which Monmouth is located, and he came out to the field. The Sheriff instructed me to hold the McBoyle ship, and if McBoyle came in, to call him. Within the next day or so Mr. McBoyle did come in flying another airplane of his own. I told him of the request of the Sheriff, and about my instructions to hold his plane, and I called up the Sheriff, and he came out. As I remember it, the Sheriff told McBoyle he was wanted in Ottawa, and McBoyle suggested that the Sheriff go with him over to Ottawa by plane;

the Sheriff did not want to ride that way, and so he
213 deputized me to take Mr. McBoyle over, which I did, using Mr. McBoyle's plane.

When we landed at Ottawa, an officer there met us, and Mr. McBoyle went with him; I also went to the jail with them. I did not remain there long, but returned back to Monmouth, flying Mr. McBoyle's plane.

* * * *

In this connection I wish to say that I am well acquainted with Mr. McBoyle; during the year 1926, and since we have been distributors for Waco Airplanes in this territory, Mr. McBoyle has been one of our dealers. He has purchased and sold altogether, twelve planes. His transactions in the purchases of these planes has been entirely satisfactory and business-like in every way. We have considered Mr. McBoyle one of our best dealers, and have found him reliable and trustworthy.

Dated this 21st day of June, 1929.

JOHN H. LIVINGSTON.

Subscribed and sworn to before me this 21st day of June, 1929. Donald P. Frazier, A Notary Public in and for Kane County, Illinois. (Seal)

Affidavit of Milo B. Lock introduced by defendant in support of motion for new trial:

"I, Milo B. Lock, being first duly sworn, on oath, deposes and says:

That I am a resident of Ottawa, Illinois, and that I am a pilot for the Illinois Vally [Valley] Service Company of Ottawa, Illinois.

214 That on or about the latter part of September, 1926, prior to the time that the plane owned by the United Aircraft Corporation of Ottawa, Illinois, was stolen, I had a conversation with, Willard Bridgeman, on the flying field used by the United Aircraft Corporation. I was at that time grinding the valve on the Waco #9 Plane Curtiss 5 Motor, which was later stolen, the conversation was general until Mr. Bridgeman asked me "We are contemplating starting a field in Texas, and we want the plane that you are working on down there to promote this proposition, and would you fly the plane

down to Texas, providing we give you the money for expenses, and if you do not wish to stay in Texas, we will pay you an additional Two Hundred Dollars for your services." I answered, "then I did not consider myself capable to fly a plane on such a trip, and then I could not take up the proposition."

Milo B. Lock, Affiant. Subscribed and sworn to before me this 26th day of June, A. D. 1929. Fr. J. McGrath, Notary Public in and for La Salle County, My Commission expires April 1933. (Seal)

Affidavit of Frank J. McGrath introduced by defendant in support of motion for new trial was in substance as follows:

"I, Frank J. McGrath, being first duly sworn on oath, deposes and says:

I am a residence of Ottawa, Illinois. I am a Justice of the Peace in and for the County of La Salle, State of Illinois. I was elected to the office of the Justice of the Peace in April, 1925, and have continued to hold said office by reelection since that time.

215 On October, 27th, 1926, upon the sworn complaint of Willard Bridgman, [Bridgeman] charging Larceny, I issued a warrant for the arrest of William W. McBoyle, of Galena, Illinois. On the same day the warrant was issued, it was served upon the person of W. McBoyle, and the said W. McBoyle was brought before me by Sheriff E. J. Welter. Upon the motion of Willard Bridgman,[Bridgeman] the complainting witiness [complaining witness] I dismissed the charge against William W. McBoyle. The reason for the dissmale [dismissal] given by Willard Bridgman, [Bridgeman] was that William McBoyle was the wrong party.

* * * *

Frank J. McGrath, Subscribed and sworn to before me this 25th, June, 1929. Thomas J. O'Meara, Notary Public in and for the County of LaSalle, State of Illinois. My Commission expires Feb. 6, 1933.

(The above affidavit was accompanied by a copy of the court record referred to therein.)

Mr. Brown: I wish to offer in evidence an extract from the Daily Republican Times of Ottawa, Illinois, dated October 27,

1926. While this is hearsay evidence in a way it is very indicative of the statements that were made at the time and the attitude locally with regard to the stealing of this ship and particularly with regard to Lacey.

(Thereupon the said articles were received in evidence, made a part hereof, and are in part as follows:)

Willard Bridgeman, representing the Ottawa Aircraft Corp., arrived today from Guymon, Okla., with the company's airplane which was stolen from the Ottawa airport October 5th.

216 * * * *

Lacey Suspected At Once.

Bridgeman became acquainted with Lacey several weeks before the Ottawa plane was stolen. On two or three occasions Lacey had come to Ottawa from Galena to advise with Bridgeman about the organization of his company and about organizing to do a passenger business and appeared unduly solicitous of Bridgeman's welfare. * * *

McBoyle Freed of Implication
in Plane Theft.

Proving to the satisfaction of Willard Bridgeman, representative of the United Aircraft Corporation, whose airplane was stolen from its flying field south of Ottawa early October 5th and was but recently recovered in Guymon, Okla., that he had nothing to do with the theft of the machine, William McBoyle of Galena, Ill, who had been held for questioning in connection with the theft of the airplane, was released from custody at a hearing before Justice Frank J. McGrath Saturday afternoon.

* * * *

Mr. Brown: I wish to offer the Niles Daily Star for July 10, 1926, the article on page 4 of the paper, entitled "Settle Dispute Over Airplane Out of Court."

(Thereupon, the article on page 4 of the Niles Daily Star for July 10, 1926, was received in evidence, made a part hereof, and is as follows:)

Settle Dispute Over Airplane Out of Court.

217 Arthur J. Lacey of Chicago was taken into custody at Benton Harbor last night and brought to Niles this

morning to answer charges made by Clifton A. Fay and Fred W. Fay of Niles, who accused him of taking away an airplane belonging to them on or about April 15.

According to the story told in Justice Roebuck's court this morning, Lacey was given authority by the owners of the plane to drive the machine from Niles to Washington, D. C., to have a new motor installed in it. He left Niles on April 15 and was not heard from again until a few days ago when the owners of plane, seeking the recovery of their property, had him brought to court. Lacey claims that on June 22nd, near Wheeling, W. Va., the plane caught fire 1,000 feet in the air, forcing him to land at a great risk of his life. The machine was a total wreck and could not be repaired. Lacey made his way back to Chicago and thence to Benton Harbor.

After both sides of the case were stated, an agreement was reached for a settlement of the case out of court, Clifton and Fred Fay, declaring that court proceedings had been started as the result of a misunderstanding and that they were fully convinced that the plane was destroyed by an unavoidable accident and not through felonious intent, the charges of theft against Lacey were withdrawn, he agreeing to settle for the plane to the satisfaction of the owners.

Mr. Brown: I would like to offer two statements. I took these at night and I was unable to get them sworn to
218 but they are signed statements. The statements of Willis E. Kysor and Clifton A. Fay of Niles, Michigan.

(Thereupon, the two statements were received in evidence, made a part hereof, and are as follows:)

Statement of W. E. Kysor.

My name is W. E. Kysor; I reside at Niles, Michigan, where I am engaged in the operation of the Niles Airport.

I am acquainted with Arthur J. Lacey, having met him sometime during the late fall of 1925, or early part of 1926; after I met him, he was around my port quite a number of times during the following weeks.

* * * * *

Soon after Lacey came to my field, he brought down a boy from Detroit, who went by the name of Frankie Roques, who also went by the name of Frankie Mitchell. Lacey told me that Roques was to take care of his plane and do mechanical work, for him, and he, Lacey, was to give Roques flying les-

sons. Roques stayed around the port with Lacey while he was here; about the time Lacey went east, Roques went to Dr. Hinkley's port, at Hinkley, Illinois, so I was told by Lacey.

D ed this 20th day of June, 1929.

WILLIS E. KYSOR.

Statement of Clifton A. Fay.

My name is Clifton A. Fay; I reside at Niles, Michigan, where I am engaged in the monument business.

During the winter and spring of 1926, my father, Fred W. Fay, and I had a J-1 Standard OX5 Motor Airplane, at Niles, Michigan, and kept it at the Niles Airways Airport.

219 At the port we met a man by the name of A. J. Lacey, an aviator, and became quite well acquainted with him. We rented our plane to him, and he flew it for several weeks around the country.

After he brought the plane back, he made us a proposition to the effect that he would take the plane to Quantico, Virginia, install a Hisso motor, and otherwise overhaul the plane; this was to be done without expense to us, and after that he was to fly the plane, and the proceeds to be divided.

An agreement was accordingly drawn up on April 10, 1929, [1926] and Lacey flew the plane away toward the south. He was to do this work as quickly as possible and bring the plane back.

We received a letter from him dated April 20, 1926, in which he related a long line of mishaps that he said had occurred on his return to Quantico; and that he had to leave the plane in the heart of the mountains; he wrote us again May 11th offering further excuses of delay; but assuring us that he would get the plane down to Quantico, and get it overhauled at a very early date.

Our next letter from him was written in June, on a letter head of the Hinkley, Illinois, Neubauer's Pharmacy; he indicated in this letter that he had just arrived in Chicago; that he had started from Quanitco, Virginia, a few days before with the plane, and after more mishaps, the plane had come down and burned up, and he had to abandon it, some

220 sixty miles from Wheeling, Virginia, and stating that anyone out around that country could show us where it burned. In going to Chicago, he must have passed near Niles, but he did not come here to explain the situation,

and did not later come here until he was brought here under arrest for stealing the plane; this case was dismissed, however. When he was here at the time of his arrest, we offered to pay his expenses and go with him to view the wreck of the plane, but he refused to go.

* * * * *

Dated June 20, 1929.

CLIFTON A. FAY.

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221 Mr. Brown: I would like to offer in evidence certified copy of the docket entry in the case of the People of the State of Michigan vs. Arthur J. Lacey.

(Thereupon, said certified copy of the docket entry was received in evidence, made a part hereof, and is as follows:)

State of Michigan, County of Berrien.

Before Herman Roebeck, one of the Justices of the Peace of the City of Niles in said County.

Names of Parties	Action	Attorneys	Fine or penalty and costs
The People of the State of Michigan, vs. Arthur J. Lacey 1926	Grand Larceny		15.62 Pd.

July 9. On complaint and on oath of Clifton A. Fay and Fred W. Fay in writing, that one Arthur J. Lacey did then and there viz: on or about Apr. 15-1926 steal and take away from Niles Twp. one O X-5 Standard Aeroplane valued at $1000. The accused was brought into court by Deputy Sheriff Bert Fellows, the complaint was read to him: After a conference between the complainants and the accused, also their respective attorneys, an amicable agreement was reached. The said Arthur J. Lacey paid court costs of $15.62 and was discharged. Court 3.00 officer Fellows $12.62.

HERMAN ROEBECK,
Justice of the Peace.

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222 Mr. Brown: There was considerable talk in this case and I think the District Attorney accepted it and he had a right to under the record that Lacey was a disinterested witness; that he had already served his time and there could be no reason for his telling a story that was not true. This fact was not known to me at the time. I do not know whether it would have been material in the case, that is before this trial and since about the middle of 1928, a civil suit pending against both Mr. McBoyle and Lacey was filed and is now pending in the United States District Court at Chicago over the Anderson Plane for the sum of $6000.00, being a petition No. 37190 in the District Court of the United States for the Northern District of Illinois, Eastern Division; I desire also to introduce the answer of McBoyle, which is a general denial.

(Thereupon, the said documents were received in evidence, made a part hereof, and are as follows:)

The petition of Gertrude Anderson of the City of Richmond, State of Indiana; is lodged against William McBoyle and Arthur J. Lacey, as defendants, and asks for a judgment of $6000.00, by reason of the alleged conversion of one Waco No. 9 bi-plane. The answer of W. W. McBoyle was a general denial.

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223 Mr. Brown: In connection with the suit in Chicago, I wish to present the affidavit of Louis A. Nack of Galena. This goes to the interest of one of the witnesses in the case aside from Lacey. (H. J. Neubauer.)

Affidavit of Louis A. Nack.

My name is Louis A. Nack and I am a resident of the city of Galena, Jo Daviess County, Illinois.

I am a reglarly [regularly] licensed attorey [attorney] licensed to practice law in the State of Illinois.

On or about November 20th, 1927, William McBoyle, formerly of this city and at that time operating an airport about three miles west of this city called me and asked me to come out to his flying field. When I arrived there were present four men, two of whom went by the name of Anderson and whom I learned later were father and son, Dr. Neubauer from Hinkley, Illinois, and the doctor's driver. The topic of conversation centered about a plane belonging to the younger Anderson that had been stolen by one Steve Lacey from some

place in Indiana. It appears that at that time Lacey was having trouble with the Federal authorities over this plane and was out on bond. I believe Neubauer said he was on Lacey's bond. The older Anderson informed McBoyle
224 that Lacey had implicated him (McBoyle) in this deal and unless McBoyle made good the loss of the plane they would see to it that McBoyle was prosecuted for the theft of this plane. Dr. Neubauer stated that he also had information that would implicate McBoyle in the theft of a plane from Ottawa, Illinois, and that unless McBoyle made good to Anderson he would see to it that McBoyle would get in trouble of [on] this deal. He stated that he had influence and would use it along this line. When these people were asked how they could arrange this with the Department of Justice they informed us that the Andersons would give Lacey a bill of sale; Lacey would give a bill of sale to a party in Minneapolis, Minn., to who he sold the plane and so on down the line so that the title would be alright and thus defeat the government's charge. All this would be done they said if McBoyle would pay the Andersons the sum of $5,000.00. Dr. Neubauer at that time said that his reason for taking such an interest in this proposition was that Lacey was indebted to him to extent of quite a sum of money and that at that time he (Dr. Neubauer) was backing a proposed non-stop flight to South America and in fact they were building the plane at that time. Lacey was to fly the ship and Dr. Neubauer was to be repaid out of the royalties received from oil companies, etc. He said at that time that if the government would convict Lacey this flight would have to be called off and that he stood to lose a lot of money.

225 After considerable talking McBoyle refused to have anything to do with these people and told them to go ahead and start whatever they wanted to against him as he had had nothing to do with any of these thefts that Lacey was mixed up in.

LOUIS A. NACK.

Subscribed and sworn to before me this 25th day of June, A. D. 1929. (Seal) Walter A. Honrich, Notary Public.

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226 Affidavit of C. L. Woodward of Dubuque, Iowa, introduced by defendant is in part as follows:

My name is C. L. Woodward; I reside at Dubuque, Iowa, where I have lived all of my life, 42 years; I am associated with the Telegraph-Herald and Times Journal, a daily paper

of Dubuque, and have been for 32 years; for the last eight years I have been Secretary of the organization.

Sometime during the latter part of October, 1926, a man by the name of A. J. Lacey, whom I had met a number of times during the previous summer at the Galena airport, came to the office of my paper in Dubuque, and had a lengthy conversation with me and our desk editor, Mr. Gerald Cosgrove. He indicated that he was through at McBoyle's port, and stated that he was leaving for San Francisco first, where he was to get some papers from some men, and then he was going to Nogales, Arizona, where he would obtain an airship. With this ship he was to carry guns and ammunition to the rebels in old Mexico.

In this conversation he also related how he had joined the marines, and how he had given them the slip. He seemed to be rather proud of the adventure he related, and wanted us to print a story with regard to his proposed trip to Mexico. However, his statements seemed so preposterous, that we did not use his story. He seemed particularly anxious for a write-up.

* * * * *

C. L. WOODWARD.

Subscribed and sworn to before me this 18th day of June, 1929. M. R. Kane, a notary public.

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227 Statement of Harry F. Brown offered by defendant in support of motion for new trial:

Saturday, the 15th of June, 1929, I had a personal conference with a Mr. A. P. Nelson of Minneapolis, Minnesota, referred to in the evidence of A. J. Lacey, in the above entitled cause, and showed Mr. Nelson the following statement contained in Lacey's testimony in said case:

"I immediately went to Minneapolis and notified Nelson about the conditions and Nelson became frightened. I talked the matter over with Nelson and we came to an agreement, Nelson and I, that I was to fly the plane temporarily away from Minneapolis and Nelson was to get in touch with Anderson and to straighten it out in some manner and Nelson wanted me to get the plane away from there. So I flew it into Montana. I was flying at the time of my arrest."

Mr. Nelson refused to give me an affidavit of the facts as claimed by him, but did make substantially the following statement:

That along the latter part of March, 1927, Lacey came to the Municipal Airport at Minneapolis, where Mr. Nelson is employed, and stayed about the port part of the time for three or four days; that on the morning of the 30th or 31st of March two investigators of the Department of Justice came to his home inquiring about the Waco plane then in his possession; that he took them to the airport to view the machine, but found it gone. That soon after he was informed that his plane was flown from the field about three oclock the day before and was seen to land near a little town close to
228 Minneapolis. That he went there and found that a plane of that description had been operated by a pilot who had been barn-storming; that he procured a picture of A. J. Lacey and showed it to a number of people who immediately identified the picture as that of the aviator who was flying the plane. That soon after he sent out notices to sheriffs and other officers in many different places; that he later learned that his plane had been used at Appleton, Minnesota; that after much search and investigation, he finally located his plane in Sidney, Montana, in the possession of A. J. Lacey; that when he went to Sidney to reclaim his plane, he found that the numbers on the plane had been changed, that his motor was out of the plane and that another motor was being installed; that he had to pay a reward at Sidney for the recovery of the plane, and that after getting the plane in shape he brought it back to Minneapolis.

Mr. Nelson emphatically denied the statement of Lacey that Lacey had taken the plane with his consent. He stated that he had given his information to the agents of the Department of Justice and that he did not care to give a written statement to me, under the circumstances.

HARRY F. BROWN.

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229 The defendant offered as a part of his evidence in support of his motion for a new trial, the following affidavits by citizens of Galena, Illinois, showing that the defendant W. W. McBoyle was a substantial citizen of good reputation in the community in which he lived:

Milton Vincent, Galena, Illinois, age seventy, formerly alderman of Galena, Illinois, and former sheriff of Jo Daviess County, Illinois.

F. H. Rickeman of Galena, Illinois, for eighteen years manager of the Interstate Light & Power Company.

A. W. Thode, mayor of the City of Galena, Illinois, formerly president of the Illinois State Firemen's Association and former alderman of Galena.

Robert I. McKeague, Jr., resident of Galena, Illinois, for twenty-nine years; alderman of the City of Galena and president of the Retail Merchants Association.

W. A. Homrich, assistant cashier of the First State and Savings Bank of Galena, Illinois, and former city treasurer.

Herman Guggenheim, resident of Galena for thirty-five years, and a retail merchant.

230 F. E. Owens, former alderman and mayor of Galene [Galena], Illinois.

S. J. Hughlett, resident of Galena, Illinois, for forty years and cashier of the Galena National Bank.

M. C. Slattery, resident of Galena, Illinois, for fifty-five years, formerly postmaster of Galena for eight years.

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231 Affidavits of the following persons were received in evidence as to the good and general reputation of the defendant W. W. McBoyle in Dubuque, Iowa, where he now lives:

Martin B. Andelfinger, mayor of the City of Dubuque, president of the Licorice Products Company of Dubuque, and Commander of Spanish American War Veterans.

William Clemens, manager of Trausch Baking Company, and formerly in the employ of the Government in the Internal Revenue Department.

W. H. Brown, general manager of the Iowa Oil Company.

Anthony A. Heeb, vice-president of the Heeb Company, distributors of automotive equipment.

O. A. Kratz, city manager of Dubuque, and former city manager of Astoria, Oregon.

Thomas M. Stampfer, secretary and treasurer of the F. J. Stampfer Company department store.

George R. Burden, chairman of the Dubuque Chamber of Commerce Aviation Committee.

John D. Knoll, attorney at law.

O. A. Reynolds, secretary of Dubuque Chamber of Commerce.

E. S. Parkes, president of the Iowa Airways Corporation of Ft. Dodge, Iowa.

Walter E. Klauer, purchasing agent of the Klauer Mfg. Company.

Charles S. Hoermann, vice-president of the Federal Bank and Trust Company, and vice-president of the Federal
232 Corporation of Dubuque, Iowa.

G. F. Sharon, manager of the Mid-West Lumber Company.

George B. Healey, retail hardware merchant.

H. L. Mathey, Chevrolet dealer.

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233 Prayer of Defendant for Approval of Bill of Exceptions.

And now in furtherance of justice and that right may be done, the defendant, William W. McBoyle, by Frank Dale, Harry F. Brown and Robert W. Hoyland, his counsel, presents the foregoing as and for his bill of exceptions in the above entitled cause, and prays that the same may be settled, allowed, signed and filed as such, and made a part of the record herein.

Said defendant certifies that to the best of his knowledge and belief he has included in said bill all testimony, rulings and records material to the questions raised on appeal; that he has used a narrative form where it appeared possible to do so without altering the meaning, but has quoted verbatim only such portions as appear to him necessary for the purposes of the record.

FRANK DALE,
HARRY F. BROWN,
ROBT. W. HOYLAND,
Counsel for Defendant.

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234 Approval Bill of Exceptions by Counsel for Plaintiff.

This is to certify that the foregoing bill of exceptions in the above entitled cause was served on me on the ..... day of November, 1929, that I have carefully examined the same

and have no amendments to suggest thereto, and agree that the same may be settled and signed as a bill of exceptions in said cause by the Honorable Judge of said court at such time and place as the same may be presented by counsel for above named defendant, without my being present and without further notice to me.

Witness my hand this ..... day of November, 1929.

ROY ST. LEWIS,
United States Attorney for the
Western District of Oklahoma.

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235 Certificate of Trial Judge to Bill of Exceptions.

Now on this 7th day of Dec., 1929, and within the time allowed by the order of this court for the presentation and filing by the defendant of his bill of exceptions herein, comes the defendant William W. McBoyle, by his attorneys, Frank Dale, Harry F. Brown and Robert W. Hoyland, and presents to the Honorable Edgar S. Vaught, the judge who presided at the trial of said cause, the foregoing bill of exceptions, and prays that the same may be settled, allowed, signed and filed as a part of the record in said cause, which is accordingly done.

EDGAR S. VAUGHT,
Judge of the United States District Court for the Western District of Oklahoma.

Endorsed: Filed in District Court on Dec. 7, 1929.

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236 (Order, July 17, 1929, extending time to file appeal papers.)
(Before Judge Vaught.)

On this 17th day of July, 1929, the defendant appears by Harry F. Brown, Esq., his attorney, and thereupon, on application of the defendant, it is ordered that the defendant be granted to September 28th, 1929, to file appeal papers herein, bond to be filed by July 29th, 1929.

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237 Petition for Appeal and for Order Fixing Amount of Bail.

To Honorable E. S. Vaught, Judge of the United States District Court in and for the Western District of Oklahoma:

The above named defendant, William W. McBoyle, feeling aggrieved by the orders, final decree and judgment rendered and entered in the above entitled cause on the 29th day of June, 1929, hereby petitions this honorable court to grant him an appeal to the United States Circuit Court of Appeals for the Tenth District, for the reasons set forth in the assignment of errors filed herewith; that a citation be issued, as provided by law, and that transcript of record, proceedings and documents upon which said orders, decree and judgment were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, under the rules of such court in such cases made and provided; that said appeal be made a supersedeas and that your petitioner be released on bail in such amount as the court may deem proper in the premises, pending the final disposition of said appeal.

WILLIAM W. McBOYLE.

By DALE, BROWN & HOYLAND,
His attorneys, Guthrie, Oklahoma.

Endorsed: Filed in District Court on Sept. 19, 1929.

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238 Order Allowing Appeal and Fixing Amount of Bail.

Upon the hearing of the petition for an appeal herein, it appearing that an assignment of errors has been duly made and filed, as required by law, it is ordered that an appeal be and the same is hereby allowed to the end that the record and proceedings in the above cause and the orders and judgment of this court heretofore entered threin may be reviewed in the United States Circuit Court of Appeals for the Tenth Circuit.

It Is Further Ordered that the amount of bond to be given by defendant on account thereof, and as a supersedeas herein, shall be Twenty-five Hundred Dollars ($2500,00).

Dated this 19th day of September, 1929.

EDGAR S. VAUGHT,
Judge of the District Court.

Endorsed: Filed in District Court on Sept. 19, 1929.

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239 **Assignment of Errors on Appeal.**

Comes now William W. McBoyle, defendant in the above entitled cause, and in connection with his appeal of said cause to the United States Circuit Court of Appeals for the Tenth District, states that in the record and proceedings of said cause, and in the final judgment therein, manifest error has intervened to the prejudice of this appellant; and he hereby files the following assignment of errors, upon which he will rely in the prosecution of his appeal of said cause, from the orders and decree made therein by the United States District Court for the Western District of Oklahoma, on the 29th day of June, 1929, to-wit:

First.

The United States District Court for the Western District of Oklahoma erred in submitting said cause to the jury for trial, and in pronouncing judgment and sentence upon this defendant therein, for the reason that the subject matter of the indictment in said cause is not embraced in the constitution or laws of the United States of America.

240 Second.

That the court erred in submitting said cause to the jury for trial and in pronouncing judgment and sentence upon this defendant therein, for the reason that an airplane is not a "motor vehicle" within the meaning of the National Motor Vehicle Theft Act, as charged in the indictment and in the instructions of the court.

Third.

That the court erred in submitting said cause to the jury for trial and in pronouncing judgment and sentence upon this defendant therein for the reason that the court had no jurisdiction of the cause of action set forth in the indictment in said cause.

Fourth.

That the court erred in submitting said cause to the jury for trial and in pronouncing judgment and sentence upon this defendant therein, for the reason that said court did not have jurisdiction of the person of this said defendant.

Fifth.

That the court erred in overruling the motion of this defendant that the jury be instructed to return a verdict of not

guilty, made at the close of the Government's case in chief, to which order the defendant duly excepted.

Sixth.

That the court erred in overruling defendant's demurrer to the evidence, and his motion to direct the jury to return a verdict of not guilty, made at the close of all of the evidence, and after both parties to the action had rested, to which order the defendant duly excepted.

241 Seventh.

The court erred in admitting the following evidence by the witness A. J. Lacey, to which the defendant duly excepted and still excepts, such evidence being incompetent, irrelevant, immaterial and highly prejudicial to the defendant McBoyle, and in violation of the Fifth Amendment to the Constitution of the United States, which prohibits a defendant being made a witness against himself, to-wit:

"A. Pat Sullivan. I went over to the depot and sent a telegram to Mr. McBoyle, and then returned to the hotel for the evening, I believe about nine or ten o'clock that evening I received an answer to the telegram.

Q. Mr. Lacey, have you the telegram that you received from Mr. McBoyle?

A. Not in my possession. I have it on file in Illinois.

Q. The original telegram or a copy?

A. Well, that I couldn't state, whether it is the original or copy.

Q. Do you have it here?

A. No, sir, I don't.

Q. Well, go ahead.

A. The following day I hauled passengers all day and at noon or in the afternoon I sent another telegram in answer to the one I received from McBoyle the evening before.

Q. How did you sign the telegram you sent?

A. Pat Sullivan.

Q. And directed it to whom?

A. William McBoyle, Galena, Illinois.

Q. Do you remember what day it was you sent that telegram to McBoyle?

A. Well, I sent one on the 10th, or one and two on the 10th, and I believe one on the 11th day of October.

Q. At this time do you recall the contents or the substance

of the contents of the telegrams you sent to McBoyle in answer to the one you received from him?

Mr. Milroy: That is objected to. The telegram itself is the best of evidence.

The Court: He is just asking if he does recall it. Overruled.

Mr. Milroy: Exception.

Q. (By Mr. Wagoner) Do you recall it?

A. Is that in answer to my first telegram?

242. Q. The first one you sent back, that you received from him, without stating what it is, do you recall its substance?

A. Yes, sir, I do.

Q. I now hand you Government's Exhibit No. 1 and ask you to examine it and state whether or not that is a copy and the contents of the telegram you sent from Guymon, Oklahoma, to McBoyle at the time you have just testified?

Mr. Milroy: Objected to on the ground that this is not the best evidence, and in the second place the original is unaccounted for. If the original can be produced it should be produced. This is purely secondary proof without first explaining the absence of the original.

Mr. Wagoner: Let me state at this time I am asking to have this identified. I will produce evidence from the operator at Guymon that all of the original telegrams are destroyed within one year, and there is no original telegram to be had in this matter, and that this is a copy that was made at the time before the originals were destroyed.

The Court: You haven't shown that this is a copy that was made at the time that the original was made.

Mr. Wagoner: I haven't sought to introduce it yet.

The Court: Very well.

Mr. Wagoner: I am asking this for the purpose of identification.

The Court: Very well, answer the question.

Mr. Milroy: Exception.

A. Yes, sir.

Q. (By Mr. Wagoner) Now then, go ahead and state what

occurred next after you sent this telegram you have just testified about.

A. I recall sending another telegram to Mr. McBoyle a few hours afterwards receiving—

Mr. Brown: Object to his statement as to what he received as being a conclusion, and not binding on this defendant.

The Court: Overruled.

Mr. Brown: Exception.

A. Receiving an answer approximately two or three hours later.

Q. On what date?

243 A. October 11th.

Q. Do you recall the substance of that telegram?

A. Yes, sir.

Q. I hand you Government's Exhibit No. 2 and ask you to examine that and state if that is a copy of the telegram you have just testified about.

Mr. Milroy: Same objection as to Government's Exhibit No. 1.

The Court: Overruled.

Mr. Milroy: Exception.

A. Yes, sir.

Q. Now what next?

A. Following the request of the telegram that Mr. McBoyle sent me I took the evening train on October 11th—

Mr. Milroy: I move that the answer be stricken because it indicates that the contents of the written document were following the request of Mr. McBoyle.

The Court: It ought to be clearly within his own knowledge. If he remembers it his knowledge would be as good as the instrument itself as far as his own acts are concerned. Overruled.

Mr. Milroy: Exception.

A. I returned to Galena, Illinois.

Q. Before we leave that. You say you received a telegram on the 10th of October?

A. Yes, sir.

Q. And did you receive any on the 11th?

A. Yes, sir.

Q. And do you remember the contents of those telegrams that you received on the 11th?

A. All of them, yes, sir.

Q. Do you remember how many there were?

A. I couldn't positively say whether I received two on the 10th or two on the 11th. I am sure there were three telegrams I received from him.

Q. I hand you Government's Exhibits 3, 4 and 5 and ask you to state whether or not those are copies of the telegrams you received from McBoyle on October 10th or 11th, or of October, 1926, at Guymon, Oklahoma.

244 Mr. Milroy: The same objection as to Government's Exhibits 1 and 2.

The Court: Overruled.

Mr. Milroy: Exception.

A. Yes, sir.

Q. Now, Mr. Lacey, go ahead and state what was done by you after the receipt of those telegrams.

A. Why, following the request, telegraphic request of Mr. McBoyle, I returned on the afternoon train or late evening train from Guymon—

Q. What date?

A. October 11th, going directly to Galena, Illinois.

Q. From where?

A. From Guymon, Oklahoma.

Q. All right.

A. Where I immediately got in touch with Mr. McBoyle.

Q. At what place?

A. Galena, Illinois."

(Original Bill of Exceptions, pages 23 to 28.)

Eighth.

Incurable error intervened in the record through evidence volunteered by the defendant Lacey by irresponsive answers to questions propounded to him, such evidence being incompetent, irrelevant, immaterial and highly prejudicial to the defendant McBoyle, and relating to a collateral matter, to-wit, another crime that the defendant Lacey had committed and pleaded guilty to; such evidence is as follows:

"Q. Now at this Federal Reformatory you were there for the theft of a plane down in Indiana, weren't you?

A. For the transportation of a plane, yes, sir.

Q. Was that the Anderson plane?

A. That was McBoyle's plane, at least he claimed it.

Q. Was that taken from a person by the name of Anderson?

A. Anderson claimed it so it come up in court finally.

Q. You pled guilty to it, didn't you?

A. Yes, sir, I did.

Q. Is that the first stolen plane you had anything to do with?

A. Yes, sir."

(Original Bill of Exceptions, page 46 to 47.)

245 Ninth.

The court erred in admitting the following evidence offered in behalf of the Government, by witness S. H. Gwin, over the objection of the defendant McBoyle, such evidence being incompetent, irrelevant, immaterial and prejudicial to the defendant McBoyle, and in violation of the Fifth amendment to the Constitution of the United States, which prohibits a defendant being made a witness against himself, to-wit:

"Q. You have seen Mr. Lacey here, have you?

A. Yes, sir.

Q. Is that the man that flew that plane in there?

A. Yes, I think so.

A. Did Mr. Lacey, the man whom you have seen here, send any telegrams while he was there?

A. He sent messages under another name, Pat Sullivan.

Q. He did send some then?

A. Yes, sir.

Q. Do you recall to what town or city in the United States that he directed the telegrams to that he sent?

Mr. Milroy: Object to that as not being the best evidence, and no foundation is laid for the introduction of this secondary evidence.

The Court: If you have an independent recollection you may answer. The telegram would be the best evidence.

A. Galena, is where they went to.

A. Do you have an independent recollection as to the name of the person to whom they were sent?

Mr. Milroy: Objected to for the same reason.

Mr. Wagoner: I am laying the foundation. I think the evidence is proper if he remembers.

The Court: He may answer.

Mr. Milroy: Exception.

246 A. Mr. McBoyle is who they went to.

Q. Have you the original telegrams that were sent by Pat Sullivan, as testified by you, or received by Pat Sullivan?

A. I have not.

Q. What is the custom of the Western Union as to the length of time these telegrams are held?

A. They are destroyed after one year.

Q. Do you know whether the telegrams you have testified about have been destroyed?

A. Yes, they have been destroyed."

(Original Bill of Exceptions, page 82 to 83.)

Tenth.

The court erred in permitting the United States District Attorney, in the cross-examination of the defendant's witness, Mathey, over the objection of the defendant, to ask numerous, improper, impertinent and prejudicial questions that inferred and assumed that the defendant had committed numerous other felonious crimes, such questions referring to matters collateral to the issue, and there being no evidence that any such crimes had ever been committed by the said defendant. These questions are indicated by the following evidence, to-wit:

"Q. You made a rather thorough investigation of this man, did you?

A. Yes, sir.

Q. Did you investigate what he was doing in Montana in 1924?

Mr. Milroy: Objected to as not proper cross examination.

The Court: Overruled.

Mr. Milroy: Exception.

Q. (By Mr. St. Lewis) Answer.

A. No, sir.

Q. Did you investigate that he was indicted at Chicago for stealing a Cadillac car in 1924?

A. No, sir.

Q. You didn't find that out?

A. No, sir.

247 Did you investigate that he was under investigation for the theft of a Wyllis-Sinclair roadster which was sold to a bootlegger at Appleton, Wisconsin?

A. We didn't. I have no knowledge of that.

Mr. Brown: We object to the form of those questions as assuming a fact not proven.

The Court: I thought this question ought not to have been gone into.

Mr. St. Lewis: No.

The Court: And was ready to rule on that, but you asked the question now and this witness has placed himself in the position as having investigated the reputation and character of this man, and testifies as a result of his investigation that this man's reputation was good. Now I think that opens it up to general cross examination. Overruled.

Mr. Brown: Exception.

Mr. Milroy: I think it does, if the Court please. I just want to make this suggestion. Counsel is couching these questions in a manner that assumes the truth of the statements. In other words, assumes the truth of these charges. I think counsel should, in justice to this man, and in justice to the jury and court, have some authentic information to base these questions upon.

Mr. St. Lewis: I can't try those cases.

Mr. Milroy: You can produce your facts.

The Court: The court will instruct the jury not to consider any evidence and reference to any former offense or alleged offense against the defendant unless the Government later offers some evidence to support that allegation.

Q. (By Mr. St. Lewis) You say you didn't investigate these matters?

A. No, sir, we knew nothing of them.

Q. Did you investigate as to all of his business activities there at Galena?

A. Insofar as we were able, yes, sir.

Q. You lived at Galena, didn't you, for a while?

A. Yes, sir, practically all my life.

Q. Were you associated with him?

A. Was I associated with him in business?

248 Q. Did you do any flying for him there on his field?

A. Yes, sir.

Q. And you went to Dubuque when he went up there, didn't you?

A. No, sir, I preceded him.

Q. A little before that?

A. Yes, sir.

Q. So you have been associated with him for a number of years, haven't you?

A. Yes, I have known him, I have been and about his field and about his operations and about his business places with him.

Q. This man Anderson that lives at Richmond, Indiana, you knew him too, didn't you?

A. No, sir.

Q. Did you know his business?

A. No, sir, I don't.

Q. He was killed at Sandusky, wasn't he?

A. I don't know.

Mr. Milroy: I don't think Mr. Anderson's character is involved.

Mr. St. Lewis: Counsel brought that Richmond matter up.

Mr. Milroy: It is not proper cross examination. I am objecting to that as not proper cross examination.

The Court: Overruled.

Mr. Milroy: Exception.

Q. (By Mr. St. Lewis) You didn't know that man?

A. No, sir.

Q. You didn't know Mr. McBoyle sent Mr. Lacey over there to get that airplane from Anderson, telling him that he had been hi-jacked when he had a load of whiskey, do you?

A. No, sir.

Q. Did you investigate that?

A. No, sir.

Q. That is all."

(Original Bill of Exceptions, 95 to 98.)

* * *

"Q. But you didn't investigate the theft of this plane at Richmond on July 12, 1926?

249 Mr. Milroy: Objected to as incompetent, irrelevant and immaterial and improper cross examination.

The Court: Overruled.

Mr. Milroy: Exception.

Q. You didn't investigate the theft of the Anderson plane at Richmond, Indiana, on July 12, 1926, did you?

A. No, sir.

Q. You knew about it, didn't you?

A. No, sir.

(Original Bill of Exceptions, page 100.)

Eleventh.

Fatal and incurable error intervened in the record by reason of certain improper, impertinent and prejudicial questions asked by the United States District Attorney of the defendant, McBoyle, on cross-examination, which said questions inferred and assumed that the defendant had committed numerous other felonious crimes not charged in the indictment, and no evidence having been introduced relative thereto, to-wit:

"Q. As a matter of fact, didn't you tell Lacey to go over there and get that machine, or that plane, because you had been high-jacked out of it on account of a load of whiskey and didn't he go over there on the night train thinking that plane was yours, thinking you had title to it and get that plane and bring it back?

A. I think you could answer that; it is ridiculous.

Q. I insist that the witness answer the question.

The Court: The attorneys have a right to ask a question and you must answer, and not argue with him, and don't volunteer any information.

Q. Let me ask you this: Why did you have your name put on the side of the Anderson plane?

A. I did not have my name put on the side of the Anderson plane.

Q. Didn't have your name painted on there?

A. No, sir.

Q. The name of your company then.

A. McBoyle airport.

250 Q. Why did you have that put on?

A. Because he damaged the rudder of it in flying activities and took the rudder off of one of the ships with my name on it and put on there.

Q. You thought it was all right to take this man Anderson's plane and do that did you?

A. I didn't know the plane was Anderson's. I thought the plane was Lacey's.

(Original Bill of Exceptions, page 161.)

* * *

"Q. Didn't you try to sell that same plane to Doctor Neubaurer sitting over there?

A. No, sir.

Q. That is not true?

A. That is not true.

Q. But the name of your company was on it?

A. One of my rudders was on that plane, yes, sir.

Q. That same plane was sold to a man by the name of Nelson in Minnesota wasn't it?

A. As far as I know it was.

Q. Before the deal was consummated up there, there was a long distance call put in for you wasn't there?

A. I think there was.

Q. If that was Lacey's plane why would he be calling you up?

A. Mr. Lacey called me and wanted to know if it was all right with me to sell the plane. He owed me considerable money and was working off the field and flying some dates I had. He wanted to know if I could handle those dates any way if he sold the plane.

Q. That was your explanation of that long distance call?

A. Yes, sir."

(Original Bill of Exceptions, page 163.)

Twelfth.

The court erred in permitting the United States District Attorney, over the objection of the defendant, to cross-examine the defendant, McBoyle, relative to certain copies of telegrams, about which the witness Lacey had testified in the Government's case in chief, and in permitting the evidence,

251 over the objection of the defendant McBoyle, such evi-

dence being incompetent, irrelevant, immaterial and prejudicial to the defendant McBoyle, and in violation of the Fifth Amendment to the Constitution of the United States, which prohibits a defendant being made a witness against himself, to-wit:

"Q. You testified on direct examination that you had some telegraphic communication with Mr. Lacey at Guymon, Oklahoma. Let me ask you if this is the first telegram you received: "William McBoyle, Galena, Illinois. Have good tip on oil business. Conditions wonderful. Wire Me—"

Mr. Milroy: That is objected to. This is the one marked for identification yesterday. I don't think, in fact, I know they were not read into the record.

The Court: No, they were not read into the record. It would not be proper for the contents of those messages to go to the jury without identification, but you can present it to the witness and ask him.

Q. (By Mr. St. Lewis) Handing you Government's Exhibit No. 1, is that a copy of the telegram that you received from Guymon, Oklahoma, on October 10th, 1926, from a man who signed his name as Pat Sullivan addressed to William McBoyle, Galena, Illinois?

A. Well, I couldn't testify as to the exact wording.

Q. Well, is that about the wording?

A. It is about the wording, yes.

Q. Did you reply to that?

A. I think I did.

Q. Handing you Government's Exhibit No. 2, I will ask you to state to the court and jury if that is your reply to Pat Sullivan at Guymon?

A. Yes, sir, I did.

Q. And then did you send a telegram on October 11th to Pat Sullivan? Handing you Government's Exhibit No. 3, I will ask you to state to the court and jury if that is the telegram?

A. Yes, sir.

Q. And in reply to that—I hand you Government's Exhibit No. 5, and ask you to state if that is a copy of the telegram that you received from Sullivan?

A. I wouldn't state—this seems to be muddled up quite a bit here in your copy. What is this down there?

252 Q. You can see it is the same word right above there.

A. I wouldn't say, but something of that order, yes, sir. I am not testifying that this is as I sent it. I couldn't.

Q. Well, it is practically that?

A. I couldn't testify to that. That has been three years ago. I couldn't testify directly.

Mr. St. Lewis: If the court please, I offer these in evidence at this particular time. I desire to ask the witness a few questions, but before doing that I want to offer these in evidence.

Mr. Milroy: With respect to the ones Mr. McBoyle identified we have no objection to those going in. We might not have any objection to the others if we had a chance to see them.

The Court: Submit them to counsel first.

Mr. Milroy: The additional objection lies in the copies here except the one Mr. McBoyle said he had sent in this, that none of them indicate the point of origin. It can't be a true copy. The point of origin is on every telegram. Some of them are undated, and for the additional reason that I think there is but one that he has testified to positively.

The Court: There are two he testified about positively and the others he said it has been sometime ago, but he recalled that was the substance of his telegram. Now there is one he wasn't so sure about.

Mr. St. Lewis: I didn't get the court's ruling. The court will recall the Western Union man testified the records are destroyed after a year.

The Court: With one exception there the telegrams I think are admissible. That is the last one you asked him about. Now on some further examination of that it might be—let me see that telegram.

(Thereupon, the questions and answers regarding Government's Exhibit No. 5, were read.)

The Court: Objection overruled.

Mr. Milroy: Exception.

(Thereupon, the telegrams above referred to, Government's Exhibits Nos. 1, 2, 3 and 5 were received in evidence."

253 (Original Bill of Exceptions, pages 164 to 167.)

(See pages 168 to 172 of Original Bill of Exceptions.)

Thirteenth.

That incurable error intervened in the record in the trial of said cause, in that the Assistant United States District Attorney, in his argument to the jury in the trial of said cause, used abusive and insulting language concerning the defendant, that was highly prejudicial, to-wit:

"but listen, this man is older, look at his eyes, look at his expression, observe him; you observed his demeanor when he was on the witness stand the other day, observed that disposition that he showed when Mr. Lewis asked him the question, and he said, 'that is a lie.' He didn't say it in a mild tone or in a voice like gentlemen speak one to another. No. There is the man that backed Lacey. There is the man that took that boy and made a criminal of him. There is the man that placed the boy behind the penitentiary bars. Lacey was man enough to confess he did wrong and paid the penalty and all we ask in this connection is that this man be made to pay the penalty along with him."

(Original Bill of Exceptions, page 214.)

Fourteenth.

That incurable error intervened in the record in that the United States District Attorney in his argument to the jury construed and interpreted the copies of telegrams that had been introduced at the instance of the Government and over the objection of the defendant, to have reference to a stolen airplane, no such reference or statement appearing directly therein, and there having been no evidence introduced after the introduction of the copies of the telegrams so explaining or interpreting the said telegrams or any part thereof.

Fifteenth.

The court erred in instructing the jury that the term "motor vehicle" includes the term "airplane," said in-
254 struction being as follows:

"The section of this statute relative to transportation is the section which the government charges the defendant with having violated. That is, that he caused to be transported in interstate commerce a motor vehicle knowing the same to have been stolen. It is true that the term airplane is not used in this section, but you are instructed the term airplane is included in the term motor vehicle as used in this statute."

(Original Bill of Exceptions, page 239.)

Sixteenth.

The court erred in pronouncing judgment and sentence upon this defendant for the reason that such judgment and sentence is contrary to the law and evidence in the case, to which judgment and sentence the defendant duly excepted.

Seventeenth.

The court erred in overruling defendant's motion for a new trial for the following reasons, among others, to-wit:

1. Because of accident and surprise which ordinary prudence and diligence on the part of this defendant could not guard against, and which was not due to the fault or negligence of the defendant.

2. Because of newly discovered evidence, which, as shown by witnesses produced in open court, and by numerous affidavits introduced upon the hearing of the motion for a new trial, it conclusively appears that there has been a miscarriage of justice in this case, and that the Government's evidence, depending primarily upon the co-defendant Lacey, was unreliable, inconsistent and unworthy of belief.

3. Because of the errors in the record and proceedings referred to in said motion for a new trial.

4. Because of the reasons set forth in the following assignment eighteen hereof.

255 Eighteenth.

The court abused its discretion in denying defendant's motion for a new trial, for the following reasons, among others, to-wit:

(a) Because the record plainly shows that the defendant, McBoyle, was surprised by the Government's evidence, which ordinary prudence could not prevent, and that from the evidence introduced upon the hearing of the motion for a new trial, consisting of numerous affidavits, records, etc., and of the evidence of witnesses produced in open court, at the time of the hearing on said motion, it conclusively appears that there has been a miscarriage of justice in this case, and that the defendant, McBoyle, has been deprived of his liberty without due process of law, and that the court should have exercised his discretion in the interest of justice by granting a new trial.

(b) That the evidence submitted by the defendant on his motion for a new trial, showed conclusively that the witness

Lacey had testified falsely in denying, on cross-examination, that he was, at the time he was on the witness stand, a deserter from the marine corps, the Government's records in the war department showing that he was then, in fact, a deserter, and such fact being material to his credibility, the truth of which the jury was entitled to know. Lacey's evidence on this point, while a witness in this case on the 24th day of May, 1929, is as follows:

"Q. Didn't you ever join the marine corps?
A. Yes, sir.
Q. You deserted from that didn't you?
A. No, sir.
Q. Have you got a discharge from it?
A. Yes, sir.
Q. Where is it?
A. At home.
Q. How long were you in the marine corps?
A. I would say about twenty months.
Q. How long did you enlist for?
A. Three years I believe.
Q. You were at one time stationed at Quantico, West Virginia, weren't you?
A. No, sir.
Q. Never?
A. Quantico, Virginia, yes, sir.
256 Q. That is during the period of time you belonged to the marines?
A. Yes, sir, there and San Diego, California.
Q. You enlisted for three years you say?
A. Yes, sir."

(Original Bill of Exceptions, page 61.)

This defendant, as a part of the evidence submitted at the hearing of his motion for a new trial, submitted to the court a report of W. C. Neville, Major General Commandant of the War Department, dated June 19th, 1929, relative to the marine corps record of the witness Lacey, which reads as follows:

"Private Lacey enlisted in the U. S. Navy on January 6, 1920, and was honorably discharged August 1, 1921, with character 'good.' He enlisted in the Marine Corps on November 17, 1921 and was discharged on September

11, 1923, at San Diego, Cal., with a bad conduct discharge pursuant to sentence of a summary courtmartial. He re-enlisted in the Marine Corps on February 15, 1926, on condition that he maintain a satisfactory record during a probationary period of six months. On June 4, 1926 while awaiting action for an unauthorized absence, he broke arrest and deserted from the Marine Barracks, Quantico, Va., and has since remained in desertion.

This man is amenable to trial by a general courtmartial for desertion and upon his return to the Marine Corps it will be necessary to take such action."

(c) That the evidence submitted by the defendant upon his motion for a new trial showed beyond a reasonable doubt that the witness Lacey, who was a co-defendant in the crime charged against the defendant, McBoyle, and upon whose evidence the Government's case depended almost entirely, had testified falsely with regard to various elements in the case necessary to constitute a crime against the defendant, William W. McBoyle, and that Lacey's testimony was inconsistent, unreliable, and unworthy of belief.

(d) That the evidence submitted on the motion for a new trial by the defendant, McBoyle, showed that there were numerous witnesses available in the State of Illinois and elsewhere who would testify in his behalf, and whose evidence would in all probability change the final result of the
257 case, the defendant being unable to produce such witnesses at the trial for the reason that he did not know and had no way of ascertaining the nature of the Government's evidence against him until the witness Lacey had testified; and was, after the production of such evidence by the Government, by reason of distance and lack of time, unable to secure the attendance of such of said witnesses as were necessary to his proper defense; that by reason of his inability to secure said witnesses, his substantial rights were materially affected, and he was unable to protect his rights as a citizen of the State of Iowa and of the United States.

Nineteenth.

The court erred in overruling defendant's motion to arrest judgment in said cause, to which ruling the defendant duly excepted.

DALE, BROWN & HOYLAND,
Attorneys for Defendant, William W. McBoyle.

Endorsed: Filed in District Court on Sept. 19, 1929.

(Supersedeas bond on appeal in the sum of $2,500, approved by the District Judge, with appellant as principal and Edward C. Redfearn and John J. Genz as sureties, was filed in the District Court on Sept. 23, 1929.)

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261 Praecipe for Transcript and Election as to Printing.

The Clerk of the above named Court will prepare and forward to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, in behalf of the defendant, William W. McBoyle, a transcript of the complete record in the above case, including the following:

(1) Indictment.

(2) Verdict.

(3) Motion for New Trial.

(4) Order overruling Motion for New Trial.

(5) Motion to Arrest Judgment.

(6) Order Overruling Motion to Arrest Judgment.

(7) Judgment and Sentence of the Court.

(8) Order Allowing Thirty Days in which to Perfect Appeal.

(9) Order Allowing Additional Time and to September 29th, 1929, to Perfect Appeal.

(10) Petition for Appeal.

(11) Notice of Appeal.

(12) Order Allowing Appeal and Supersedeas.

(13) Assignment of Errors.

(14) Citation.

(15) Appeal Bond.

(16) Bill of Exceptions, including Oral Testimony, Affidavits and Documents Submitted on Motion for New Trial, excepting only the Affidavits of Character and Reputation.

(17) This Praecipe for Transcript and Election as to Printing.

(18) Clerk's Certificate.

262 Said defendant, William W. McBoyle, does hereby give notice of his election to have the printing of said transcript of record upon the appeal herein done under the

supervision of the Clerk of the United States Circuit Court of Appeals for the Tenth District at Denver, Colorado, under the rules of said court.

DALE, BROWN & HOYLAND,
Attorneys for Defendant, William W. McBoyle,
Guthrie, Oklahoma.

Receipt of copy of the foregoing transcript and election as to printing is hereby acknowledged this 23rd day of September, 1929.

HERBERT K. HYDE,
Assistant U. S. Attorney.

Endorsed: Filed in District Court on Sept. 23, 1929.

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263 (Clerk's Certificate to Transcript.)

United States of America, Western District of Oklahoma, ss:

I, Theodore M. Filson, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court, in case No. 6809, Criminal, wherein The United States of America, is plaintiff, and William W. McBoyle, is defendant, as full, true and complete as the said transcript purports to contain and as called for by the praecipe for transcript of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Oklahoma City, in said District, this 27th day of December, A. D. 1929.

(Seal) THEODORE M. FILSON, Clerk.

By GRACE G. BUTLER, Deputy.

Filed Dec. 30, 1929. Albert Trego, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Appearances.

For Appellant.

The Clerk will enter my appearance as Counsel for the appellant.

FRANK DALE,
HARRY F. BROWN,
ROBT. W. HOYLAND.

Endorsed: Filed Jan. 6, 1930. Albert Trego, Clerk.

For Appellee.

The Clerk will enter my appearance as Counsel for the appellee.

ROY ST. LEWIS.

Endorsed: Filed Feb. 12, 1930. Albert Trego, Clerk.

Motion For Additional Time In Which To File Brief.

Comes now Harry F. Brown, one of the attorneys for William W. McBoyle, appellant in the above entitled cause, and moves the court for an order allowing until May 10th, 1930, as additional time in which to file a brief on behalf of the appellant in said cause, and for grounds of such motion states:

That the above cause has been set for hearing in Denver on the 4th day of June, 1930, and the time for filing said brief expires today, April 25th.

That by reason of the death of Judge Frank Dale, senior member of the firm of Dale, Brown & Hoyland, attorneys for appellant in said cause, it has been impossible to complete the preparation of said brief in time; but that the same should be completed within time to file by May 10th; that the matter of extension of time has been discussed with Mr. Roy St. Lewis, United States Attorney, and he has suggested that it would be satisfactory to him for an extension to be allowed to May 10th.

Wherefore, appellant moves the court for an order allow-

ing him until May 10th, 1930, to serve and file brief on behalf of appellant, on the attorneys for the Government.

HARRY F. BROWN,
One of the attorneys for Appellant.

State of Oklahoma, Logan County, ss.

Harry F. Brown, of lawful age, being first duly sworn, upon oath, states: that he is one of the attorneys in the above entitled cause, that he has read the above and foregoing motion, knows the contents thereof, and that the statements and allegations therein contained are true.

HARRY F. BROWN.

Subscribed and sworn to before me this 25th day of April, 1930.

GERTIE POPE,
(Notarial Seal) Notary Public.

My commission expires November 18th, 1931.

Endorsed: Filed Apr. 28, 1930. Albert Trego, Clerk.

Order Allowing Time To File Brief.

Now on this 25th day of April, 1930, comes on for hearing before me, John H. Cotteral, United States Circuit Judge, Tenth Circuit, at Guthrie, Oklahoma, the motion on behalf of appellant in the above entitled cause for an extension of time from April 25th, 1930, to May 10th, 1930, in which to serve and file brief on behalf of appellant in the above entitled cause.

Upon consideration of such motion and being advised in the premises, it is found that said additional time should be allowed.

It Is, Therefore, ordered that appellant in said cause be and he hereby is allowed until May 10th, 1930, to serve and file his brief in the above entitled cause.

JOHN H. COTTERAL,
United States Circuit Judge.

Endorsed: Filed Apr. 28, 1930. Albert Trego, Clerk.

(Order of Submission.)

Fourth Day, June Term, Thursday, June 5th, A. D. 1930.

Before Honorable John H. Cotteral, Honorable Orie L. Phillips, and Honorable George T. McDermott, Circuit Judges.

This cause came on to be heard and was argued by counsel, Harry F. Brown, Esquire, appearing for appellant, and Roy St. Lewis, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

(Opinion.)

No. 213—June Term, 1930.

[August 18, 1930.]

Mr. Harry F. Brown (Mr. Frank Dale and Mr. Robert W. Hoyland were with him on the brief), for appellant.

Mr. Roy St. Lewis, United States Attorney (Mr. Fred A. Wagoner and Mr. William Earl Wiles, Assistant United States Atorneys, were with him on the brief), for appellee.

Before Cotteral, Phillips and McDermott, Circuit Judges.

Phillips, Circuit Judge, delivered the opinion of the Court.

William W. McBoyle was convicted and sentenced for an alleged violation of the National Motor Vehicle Theft Act, Sec. 408, Title 18, U. S. C. The indictment charged that on October 10, 1926, McBoyle caused to be transported in interstate commerce from Ottawa, Illinois, to Guymon, Oklahoma, one Waco airplane, motor No. 6124, serial No. 256, which was the property of the United States Aircraft Corporation and which had theretofore been stolen; and that McBoyle then and there knew it had been stolen.

The evidence of the government established the following facts: During the year 1926, McBoyle operated a commercial airport at Galena, Illinois. On July 2, 1926, McBoyle hired A. J. Lacey as an aviator for a period of six months. In October, 1926, McBoyle induced Lacey to go to the field of the Aircraft Corporation at Ottawa, Illinois, and steal such Waco airplane from the Aircraft Corporation. Lacey went to Ottawa, stole the airplane and flew it to Galena, arriving there October 6th. McBoyle inquired of Lacey if any one knew the latter had taken the airplane at Ottawa. Lacey replied in the negative. Thereupon, McBoyle changed the

serial number to No. 249, and painted it over in order to conceal the alteration. McBoyle and Lacey serviced the airplane and supplied it with gas and oil. McBoyle gave Lacey $150 for expense money and instructed Lacey to fly the airplane to Amarillo, Texas, and there lease an airport for them to operate during the winter months. McBoyle arranged with Lacey to communicate with him en route by telegraphic code under the name of Pat Sullivan. Lacey left McBoyle's airport at Galena, Illinois, on October 6th and flew the airplane to Guymon, Oklahoma, stopping en route at St. Joseph, Missouri, and Garden City, Kansas. At Guymon, they communicated with each other by telegraph and McBoyle instructed Lacey to sell or store the stolen airplane and come back to Galena. Thereupon, Lacey returned to Galena. McBoyle then gave Lacey $250 for expenses and instructed Lacey to take an airplane of the same kind and make belonging to McBoyle back to Guymon and substitute it for the stolen airplane. The purpose was to deceive the officers when they found the Waco plane at Guymon. Lacey started back to Guymon with the second airplane but crashed near Inman, Kansas. Thereupon, Lacey returned to Galena and continued to work for McBoyle until the following December.

McBoyle denied all of the facts incriminating him except the sending and receiving of the telegrams. He testified that the telegrams did not refer to the airplane but to liquor which Lacey was supposed to have had in his possession in the airplane.

The primary question is whether an airplane comes within the purview of the National Motor Vehicle Theft Act. This act defines the term "motor vehicle", as follows:

> "The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self propelled vehicle not designed for running on rails."

Counsel for McBoyle contend that the word "vehicle" includes only conveyances that travel on the ground; that an airplane is not a vehicle but a ship; and that, under the doctrine of ejusdem generis, the phrase "any other self propelled vehicle" cannot be construed to include an airplane.

The Century dictionary gives the derivation of the word "vehicle" as follows, "F. Vehicule, L. Vehiculum", meaning a "conveyance, carriage, *ship.*" It defines the word as, "Any receptacle, or means of transport, in which something is carried or conveyed or *travels.*" (Italics ours.)

It will be noted that the Latin word "vehiculum" means a ship as well as a carriage.

Webster defines the word "vehicle" as follows:

> "(1) That in or on which any person or thing is or may be carried, esp. on land, as a coach, wagon, car, bicycle, etc.; a means of conveyance.
>
> (2) That which is used as the instrument of conveyance or communication."

Corpus Juris, Vol. 42, page 609, Sec. 1, defines a motor vehicle, as follows:

> "A 'motor vehicle' is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials; and as the term is used in the different statutes regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracks."

Both the derivation and the definition of the word "vehicle" indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities used for traveling on land, although the latter may be the limited or special meaning of the word. We do not think it would be inaccurate to say that a ship or vessel is a vehicle of commerce.

An airplane is self-propelled, by means of a gasoline motor. It is designed to carry passengers and freight from place to place. It runs partly on the ground but principally in the air. It furnishes a rapid means of transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck or motor-cycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term "any other self propelled vehicle," does not offend against the maxim of ejusdem generis.

Furthermore, some meaning must be ascribed to the general phrase "any other self propelled vehicle," which Congress wrote into the Act. It specifically enumerated all of the known self-propelled vehicles designed for running on land. It used the word "automobile," a generic term, which in-

cludes all self-propelled motor vehicles that travel on land and are used for the transportation of passengers, except those designed for running on rails. 42 C. J. p. 609, Sec. 2.

We conclude that the phrase "any other self propelled vehicle" includes an airplane, a motor boat and any other like means of conveyance or transportation which is self-propelled, and is of the same general class as an automobile and a motor cycle.

Counsel for McBoyle contend that the evidence failed to establish that he committed any crime in the Western District of Oklahoma, and that therefore the United States District Court for that district, because of the provisions of Sec. 2, Art. 3, of the United States Constitution and the 6th Amendment to the United States Constitution, was without jurisdiction.

The Motor Vehicle Theft Act provides that "whoever shall transport or cause to be transported in interstate commerce * * * a motor vehicle shall be punished, etc." and that "any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The crime of transporting a stolen motor vehicle in interstate commerce is a continuing offense. It is committed in each state and district through which such vehicle is transported. It was not essential that McBoyle should have been physically present in the Western District of Oklahoma. The constitutional requirement is that the accused shall be tried in the state or district where the crime is committed, but not necessarily in the state and district where the accused was at the time the crime was committed. It is sufficient if the crime was committed in the Western District of Oklahoma and McBoyle caused it to be committed there.

Salinger v. Loisel, 265 U. S. 224, 235; Burton v. United States, 202 U. S. 344, 387; In Re Palliser, 136 U. S. 257, 265-268.

The jury was warranted in finding, from the evidence, that McBoyle caused Lacey to undertake to transport such airplane from Ottawa, Illinois, to Amarillo, Texas, that Lacey started from Ottawa and succeeded in flying as far as Guymon, Oklahoma, and that, upon telegraphic instructions from McBoyle, Lacey stored the airplane at Guymon and returned to Galena; and in concluding that McBoyle caused the offense to be committed in the Western District of Oklahoma.

At the trial, Mathey, a witness in behalf of McBoyle, testi-

fied as to the good reputation of the latter, after stating that he had made an investigation into McBoyle's character. Upon cross-examination, he was asked whether or not, through such investigation, he had learned of specific charges or reports concerning McBoyle. Objection to this line of cross-examination was overruled. Counsel for McBoyle contend that such ruling was error. It is within the discretion of the trial court to permit a witness, as to reputation, to be asked upon cross-examination as to particular charges against or reports concerning the person whose reputation is under investigation. Such evidence is admissible to test the knowledge and credibility of the witness, but not as substantive evidence against the defendant. White v. State, 11 Ala. 92, 21 Sou. 330; Smith v. State, 103 Ala. 57, 15 Son. 866, 871; McCreary v. Commonwealth, 158 Ky. 612, 165 S. W. 981; People v. Gordon, 103 Cal. 568, 37 Pac. 534-535. We do not think the court abused its discretion in the instant case.

During the course of the cross-examination of McBoyle, he was interrogated by counsel for the government concerning matters that indicated he may have been connected either directly or indirectly with other offenses—a stolen automobile, another airplane stolen by Lacey, and some transactions concerning intoxicating liquor. These matters would have been immaterial and improper but for the fact that they were first injected into the case by counsel for McBoyle upon the cross-examination of Lacey and in the direct examination of McBoyle. Having opened up these subjects, McBoyle cannot complain because counsel for the government inquired concerning them in his cross-examination of McBoyle. State v. Ritter, —— Mo. ——, 231 S. W. 606, 608; Olive v. State, —— Neb. ——, 7 N. W. 452; State v. Mott, 72 Mont. 306, 233 Pac. 602, 604; 40 Cyc. 2496.

Counsel for McBoyle contend that the court erred in admitting, over objection, copies of the telegrams which passed between McBoyle and Lacey while the latter was at Guymon. McBoyle admitted sending and receiving the telegrams and admitted the correctness of some of the copies. Lacey identified copies of the telegrams and stated that they were sent and received by him. The telegraph operator at Guymon testified that he furnished copies of the telegrams to the United States Attorney and that the originals had been destroyed. A sufficient foundation was laid for the admission of the copies and the evidence was material.

After the verdict, McBoyle filed a motion in arrest of judgment and for a new trial. Counsel for McBoyle contend that the court erred in denying these motions. Matters presented

by these motions were addressed to the discretion of the trial court. We have examined the record and are convinced that the trial court did not abuse its discretion in denying such motions. A ruling on a motion for a new trial will not be disturbed on appeal, in the absence of an abuse of discretion. Gibson v. Luther (C. C. A. 8), 196 Fed. 203, 206; Hamilton & Sons Co. v. Moss-Jellicoe C. Co. (C. C. A. 6), 271 Fed. 237, 238; Capital Traction Co. v. Sneed, 26 Fed. (2d) 296, 301; Detroit United Ry. Co. v. Craven (C. C. A. 6), 13 Fed. (2d) 352.

The judgment is therefore Affirmed.

Cotteral, Circuit Judge, dissenting. I feel bound to dissent on the ground that the Motor Vehicle Act should not be construed as relating to the transportation of airplanes.

A prevailing rule is that a penal statute is to be construed strictly against an offender and it must state clearly the persons and acts denounced. 25 R. C. L. pp. 1081-2-3-4; Anamoose v. United States, 206 Fed. 374.

It woud have been a simple matter in enacting the statute to insert as descriptive words, airplanes, aircraft, or flying machines. If they had been in the legislative mind, the language would not have been expressed in such uncertainty as "any other self-propelled vehicle not designed for running on rails." The omission to definitely mention airplanes requires a construction that they were not included. Furthermore, by excepting vehicles running on rails, the meaning of the Act is clarified. These words indicate it was meant to be confined to vehicles that *run* but not on rails, and it did not extend to those that *fly*. Is it not an unreasonable view that airplanes fall within the description of self-propelled vehicles that do not run on rails? The question is its own answer.

The rule of *ejusdem generis* has special application to this statute. General words following a particular designation are usually presumed to be restricted so as to include only things or persons of the same kind, class, or nature, unless there is a clear manifestation of a contrary purpose. 25 R. C. L. pp. 996-7. The general description in this statute refers to vehicles of the same general class as those enumerated. We may assume an airplane is a vehicle, in being a means of transportation. And it has its own motive power. But is an airplane classified generally with "an automobile, automobile truck, automobile wagon, or motor cycle?" Are airplanes regarded as *other types of automobiles* and the like? A moment's reflection demonstrates the contrary.

Counsel for appellant have referred us to the debates in

Congress when the Act was pending as persuasive of an interpretation in his favor. (House, Cong. Rec., vol. 58, part 6, pp. 5470 to 5478; Senate, Id., vol. 58, part 7, pp. 6433 to 6435.) The proceedings are not permissible aids, apart from the journals or committee reports. But they may be referred to as showing the history of the period. Standard Oil Company v. United States, 221 U. S. 1. The discussions of the proposed measure are enlightening in this case from a historic standpoint, in showing that the theft of automobiles was so prevalent over the land as to call for punitive restraint, but airplanes were never even mentioned.

It is familiar knowledge that the theft of automobiles had then become a public menace, but that airplanes had been rarely stolen if at all, and it is a most uncommon thing even at this date. The prevailing mischief sought to be corrected is an aid in the construction of a statute. 25 R. C. L. 1016.

I am constrained to hold that airplanes were not meant by the Act to be embraced in the designation of motor vehicles, and that the indictment charged no offense against the defendant.

(Judgment.)

Nineteenth Day, June Term, Monday, September 8th, A. D. 1930.

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable George T. McDermott, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed, and that United States of America, appellee, have and recover of and from William W. McBoyle, appellant, its costs herein and have execution therefor.

Petition For Stay Of Execution And Enforcement Of Judgment Pending Application For Writ of Certiorari To The Supreme Court Of The United States On Behalf of Appellant.

Comes now William W. McBoyle, appellant in the above entitled cause, and shows to the court:

That at the January, 1928, term of the District Court of the United States, for the Western District of Oklahoma, an indictment was presented against this petitioner, William W. McBoyle, jointly with one A. J. "Steve" Lacey, alias Pat Sullivan, as follows:

"In the District Court of the United States For The Western District of Oklahoma.

United States of America, Plaintiff, vs. William W. McBoyle and A. J. "Steve" Lacey, alias Pat Sullivan, defendants. No. 6809.

Indictment.

Violation National Motor Vehicle Theft Act.

At the January, 1928, Term of the District Court of the United States for the Western District of Oklahoma, begun and held at the city of Oklahoma City, in said District, on the 16th day of January, in the year of our Lord one thousand nine hundred twenty-eight, the Grand Jurors of the United States of America, within and for said District, having been duly summoned, empannelled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Oklahoma, upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present:

That on the 10th day of October, 1926, in Texas County, in the Western District of Oklahoma, and within the jurisdiction of this court, one William W. McBoyle and A. J. "Steve" Lacey, alias Pat Sullivan, whose more full, true and correct names are to the Grand Jurors unknown, then and there being, did then and there unlawfully, knowingly, wilfully and feloniously transport, and cause to be transported in interstate commerce, that is to say, from Ottawa, in the State of Illinois, to Guymon, in the Western District of Oklahoma, a certain motor vehicle, to-wit: one Waco Airplane, Motor No. 6124, Serial No. 256, which had theretofore been stolen from the owner thereof, the United States Aircraft Corporation, a corporation created and existing under and by virtue of the laws of the State of Illinois; they, the said William W. McBoyle and A. J. "Steve" Lacey, alias Pat Sullivan, then and there well knowing the said described motor vehicle to have been stolen;

Contrary to the form of the statute in such case made and

provided, and against the peace and dignity of the United States of America.

LESLIE E. SALTER,
Assistant United States Attorney.

Endorsed: A true bill, L. A. Macklanburg, Foreman. Returned and Filed in open court this 18th day of January, A. D. 1928. Theodore M. Filson, Clerk."

That said cause came on for trial against this defendant in said United States District Court, for the Western District of Oklahoma, at Guthrie, on the 25th day of May, 1929, was tried to a jury and a verdict of guilty returned against him by said jury on the 27th day of May, 1929; that thereafter, and on the 29th day of June, 1929, judgment and sentence was duly passed upon this petitioner by said court as follows:

"On this 29th day of June, 1929, the plaintiff appears by Roy St. Lewis, Esq., United States Attorney, and the defendant in person and by Messrs. Dale, Brown & Hoyland, his attorneys. Thereupon, motion of the defendant for new trial comes on for hearing, evidence is heard thereon, and affidavits are read, and the court being duly advised in the premises, it is ordered that said motion be and the same is overruled and exceptions allowed the defendant. Thereupon, motion in arrest of judgment comes on for hearing, and the court being fully advised in the premises, it is ordered that said motion be and the same is overruled and exceptions allowed the defendant, and,

It is thereupon by the Court here considered, ordered and adjudged that the defendant, William W. McBoyle, for the crime by him committed, as charged in the indictment, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, and confined for the term of Three (3) years from date of delivery, and that he pay a fine unto the United States in the sum of Two Thousand Dollars ($2000.00), and further stand committed until said fine is paid, or, until released by due process of law.

And it is further ordered that the Marshal of said District transport the said William W. McBoyle and deliver him to the warden of said United States Penitentiary at Leavenworth, Kansas, without delay.

To which judgment and sentence of the court, the defendant excepts, and asks and is granted ninety (90) days from this date in which to file bill of exceptions herein. It is further ordered that the defendant be released upon his appearance bond, and that said bond remain in force for the period

of thirty days from this date. It is further ordered that bond on appeal be fixed in the sum of $2500.00, said bond to be filed within thirty days."

That thereafter, and on the 19th day of September, 1929, this petitioner duly perfected his appeal from said judgment and sentence of said District Court to the United States Circuit Court of Appeals for the Tenth Circuit, and duly filed his appeal bond in said court in the principal sum of Twenty-five Hundred Dollars ($2500.00), which was duly approved by the Judge of said court,

Your petitioner further states that said cause came on for hearing before the said United States Circuit Court of Appeals at Denver, Colorado, on the 6th day of June, 1930, and was duly argued to the court; that the opinion of said court was filed on the 18th day of August, 1930, and duly entered on the 8th day of September, 1930, affirming the judgment of the trial court.

Your petitioner further states that he desires to apply for and to obtain a writ of certiorari from the Supreme Court of the United States to the said United States Circuit Court of Appeals for the Tenth Circuit, to certify said cause to the Supreme Court for further review and determination by such court; that this petitioner desires a stay of execution and enforcement of such judgment or decree for a reasonable time to enable him to apply for such writ of certiorari from the United States Supreme Court, and that the amount and conditions of his bond, pending such application and hearing thereof by the Supreme Court, and if granted, pending the final determination thereof by such court, be determined and ordered by this court, pursuant to the provisions of Section 350, Title 28 of the United States Code, Section 8, Act of February 13th, 1925, Chapter 229, 43 Stat., 936, Effective May 13th, 1925; that if possible the enforcement and execution of such judgment be stayed for sixty days from this date to enable petitioner to make his application for writ of certiorari, as aforesaid.

Wherefore, petitioner, William W. McBoyle prays the court that an order be entered by one of the Judges thereof, staying the execution and enforcement of the judgment of said court and withholding the mandate of such judgment for a period of sixty days from this date, in order to allow this appellant an opportunity to apply for a writ of certiorari to said United States Circuit Court of Appeals from the Supreme Court of the United States; and petitioner fur-

ther prays that said Court enter its order determining the conditions and the amount of the bond of this appellant, as required by law.

WILLIAM W. McDOYLE,
By HARRY F. BROWN,
His Attorney.

Endorsed: Filed Sept. 30, 1930. Albert Trego, Clerk.

Order.

Now on this 20th day of September, 1930, comes on to be heard before me, John H. Cotteral, a Judge of the United States Circuit Court of Appeals for the Tenth Circuit, at chambers in Guthrie, Oklahoma, the petition of William W. McBoyle for an order staying, for a period of sixty days from this date, the mandate, enforcement and execution of the judgment entered in the above entitled cause on the 8th day of September, 1930, affirming the judgment of the lower court, as shown by the record in said cause, in order to enable the said petitioner to apply for a Writ of Certiorari from the Supreme Court of the United States, directed to the above entiled court, and for an order determining the amount and conditions of the bond to be given pursuant thereto. Upon consideration of said petition, it appears that said order should be granted.

It Is, Therefore, Ordered that the mandate, and the enforcement and execution of the judgment entered by the United States Circuit Court of Appeals for the Tenth Circuit in the above entitled Cause No. 213, on the 8th day of September, 1930, be, and the same hereby is, stayed for a period of sixty days to enable the petitioner, William W. McBoyle, to apply for a Writ of Certiorari from the Supreme Court of the United States, directed to the above entitled court, to certify said cause to the Supreme Court for further review and determination by such court, on condition that said petitioner shall, within ten days, give a bond, the condition of which said obligation shall be that if said petitioner fails to make application for such Writ within the period of sixty days herein allowed, unless, for good cause shown, further time be allowed, as provided by law, or fails to obtain an order granting his application, or fails to make his plea good in the

Supreme Court, he shall answer for all damages and costs which the United States may sustain by reason of such stay.

JOHN H. COTTERAL,
Judge, Circuit Court of
Appeals, Tenth Circuit.

Endorsed: Filed Sept. 30, 1930. Albert Trego, Clerk.

(Bond)

Know All Men By These Presents:

That we, William W. McBoyle, as principal, and Scott H. Deaner and Arthur H. Haas and G. H. Wescott, as sureties, are held and firmly bound, unto the United States of America, in the full and just sum of Five Hundred and no/100 Dollars ($500.00), to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of September, in the year of our Lord, One Thousand Nine Hundred and Thirty.

Whereas, lately, and on the 8th day of September, 1930, judgment was entered in the United States Circuit Court of Appeals for the Tenth Circuit, (opinion filed August 18th, 1930), in Cause No. 213, in which William W. McBoyle was appellant and the United States of America was the defendant, affirming judgment of the District Court in and for the Western District of Oklahoma, against the said William W. McBoyle, all as shown by the record therein; and,

Whereas, The said William W. McBoyle has duly filed his application for a stay of the mandate and of the execution and enforcement of such judgment to enable him to make application for a Writ of Certiorari from the Supreme Court of the United States to the said United States Circuit Court of Appeals for the Tenth Circuit; and,

Whereas, the Honorable John H. Cotteral, a Judge of the United States Circuit Court of Appeals, has granted said order staying such mandate and execution of such judgment for a period of sixty days in which said application is to be made by the said William W. McBoyle.

Now the condition of the above obligation is such that if the said William W. McBoyle shall duly make his application for such Writ within the period of time allotted therefor by

said order, and shall obtain an order granting said application, and shall answer all damages and costs sustained by the United States, if he fails to make good his plea, then this obligation shall be void; otherwise, to remain in full force, virtue and effect.

WILLIAM W. McBOYLE,
SCOTT H. DEANER,
ARTHUR A. HAAS,
G. H. WESCOTT.

Signed by William W. McBoyle, Scott H. Deaner and Arthur H. Haas, in the presence of, and acknowledged before me this 23rd day of September, 1930.

I. M. STEWART,
Notary Public.

(Notarial Seal)

Commission expires: April 2nd, 1932.

Signed by G. H. Wescott in the presence of and acknowledged before me this 26 day of September, 1930.

C. W. ALLEN,
Notary Public.

(Notarial Seal)

Commission expires: 4/2/31.

State of Illinois, County of Stephenson, ss:

Scott H. Deaner, being first duly sworn, upon oath states that he is a resident and freeholder of Stephenson County, State of Illinois; that he is the owner of property in such State worth, over and above all debts, liabilities and exemptions, the sum of Twenty Thousand Dollars.

SCOTT H. DEANER.

Subscribed and sworn to before me this 23rd day of September, 1930.

I. M. STEWART,
Notary Public.

(Notarial Seal)

My commission expires: April 2nd, 1932.

State of Oklahoma, County of Logan, ss:

G. H. Wescott, being first duly sworn, upon oath states that he is a resident and freeholder of Logan County, State of Okla.; that he is the owner of property in such state worth, over and above all debts, liabilities and exemptions, the sum of Twenty-five Thousand Dollars.

G. H. WESCOTT.

Subscribed by G. H. Wescott and sworn to before me this 26th day of September, 1930.

C. W. ALLEN,
(Notarial Seal) Notary Public.

My commission expires 4/2/31.

State of Illinois, County of Stephenson, ss:

Arthur H. Haas, being first duly sworn, upon oath states that he is a resident and freeholder of Stephenson County, State of Illinois; that he is the owner of property in such state worth, over and above all debts, liabilities and exemptions, the sum of Thirty Thousand ($30,000.00) Dollars.

ARTHUR A. HAAS.

Subscribed and sworn to before me this 23rd day of September, 1930.

I. M. STEWART,
(Notarial Seal) Notary Public.

My commission expires: April 2nd, 1932.

Approved this 26th day of September, 1930.

JOHN H. COTTERAL,
Judge of the United States Circuit Court of Appeals for the Tenth Circuit.

Endorsed: Filed Sept. 30, 1930. Albert Trego, Clerk.

Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Oklahoma as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals for the Tenth Circuit (except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), in a certain cause in said Circuit Court of Appeals wherein William W. McBoyle was Appellant and United States of America was Appellee, as full, true and complete

as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the City of Denver, Colorado, this 25th day of October, A. D. 1930.

ALBERT TREGO,
Clerk of the United States Circuit
Court of Appeals, Tenth Circuit.

(Seal, U. S. Circuit Court
of Appeals, Tenth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 12, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, the argument and briefs to be limited to the question whether the National Motor Vehicle Theft Act applies to aircraft. The case is advanced and assigned for argument on Tuesday, February 24th next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM-1930

No. 552

WILLIAM W. McBOYLE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

to United States Circuit Court of Appeals for the Tenth Circuit

AND

BRIEF IN SUPPORT OF PETITION

HARRY F. BROWN,
Attorney for Petitioner.
Guthrie, Oklahoma.

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IN THE

Supreme Court of the United States

OCTOBER TERM-1930

No._____

WILLIAM W. McBOYLE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of William W. McBoyle respectfully shows to this Honorable Court:

—A—

SUMMARY STATEMENT OF THE MATTER INVOLVED

While other points are raised, the first and primary question in this case is one of jurisdiction of the trial court. The

case arose by indictment filed in the District Court of the Western District of Oklahoma, on January 18th, 1928 (R 2), in which this petitioner, William W. McBoyle, was jointly charged with one A. J. "Steve" Lacey, alias Pat Sullivan, under the National Motor Vehicle Theft Act, with transporting an aeroplane, on October 10th, 1926, from Ottawa, in the State of Illinois, to Guymon, in the Western District of Oklahoma, knowing the same to have been stolen.

The pertinent portions of the Act applicable to this case are as follows:

> "408. *Motor Vehicles*—Transportation, Etc., of Stolen Vehicles. This section may be cited as the *National Motor* Vehicle Theft Act. The term '*motor vehicle*' when used in this section, shall include an *automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;* * * * Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a *motor vehicle*, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both. * * * *." (Title 18, Sec. 408, U. S. Criminal Code of Procedure; See Appendix, Page 28).

It will be noted that the word "aeroplane" does not appear in the Act; nor are any similar words, such as aircraft, airship, or flying machine, used. The legality of the indictment, and consequently, the jurisdiction of the trial court, therefore, depends upon the construction placed upon the term "motor vehicle" as used and defined in the Act. In other words, does the language of the National Motor Vehicle Theft Act quoted above include and embrace aeroplanes? The instruction (R. 112) of the trial court to the jury on this point was as follows:

> "It is true that the term aeroplane is not used in this section, but you are instructed the term aeroplane is included in the term 'motor vehicle', as used in this statute."

The majority opinion (R. 171) of the Circuit Court of Appeals for the Tenth Circuit, to which this petition is directed, sustained the contention of the Government and affirmed the trial court on all of the assignments of error, including those raising the question of jurisdiction (R. 150), thus, in effect, holding that the term "motor vehicle" includes aeroplanes (R. 174).

Circuit Judge John H. Cotteral dissented from the majority opinion, holding that an aeroplane is not a motor vehicle within the meaning of the National Motor Vehicle Theft Act, and that the trial court was therefore without jurisdiction. (R. 176).

STATEMENT OF THE FACTS.

The facts are substantially as follows:

The transportation of the plane in question took place from October 6th, 1926, to October 10th, 1926, (R. 16), although the indictment was not filed until about a year later, when the defendant Lacey was apprehended in Montana with a plane subsequently stolen by him from Minneapolis, Minnesota, (R. 35). He was then returned to Oklahoma under warrant charging him with the illegal transportation of the Ottawa, Illinois, plane on which this case is based. Lacey then related his story, admitting the charge and implicating this petitioner in the transportation of the Illinois plane, which led to petitioner's indictment with Lacey in this case. Lacey later pleaded guilty, and was sentenced to serve a year in the penitentiary at Chillicothe, Ohio, (said sentence to run concurrently with a former sentence from the State of Indiana, R. 35). The trial of McBoyle, this petitioner, did not come on until the 24th day of May, 1929, at which time Lacey had been released from the penitentiary under both of his sentences, and appeared as a witness in this case. The Government relied almost wholly on Lacey for its testimony against this petitioner. The situation is clearly indicated by the following comment of the trial court to the jury (R. 116).

"Now, gentlemen, it largely resolves itself into a situation of whether you believe the testimony of the defendant McBoyle, or whether you believe the testimony of Lacey."

Lacey testified that he first met this petitioner, McBoyle, about the 1st of July, 1926; that he was employed by petitioner during the summer as a pilot at $35.00 a week and commission (R. 16); that he stole the plane at Ottawa, Illinois, on October 6th, 1926, and flew it to the petitioner's airport at Galena, Illinois, (R. 17), but states that he did so as the employ of and at the direction of this petitioner (R. 16); that while the plane was being serviced at the port, the petitioner filed off the serial number of the plane (R. 17) and repainted a fitting (R. 18); that he, Lacey, then proceeded West, at the request of petitioner, intending to go to Amarillo, Texas; that he stopped at two or three places en route and in passing over Guymon, Oklahoma, on October 10th, 1926, he noticed a fair and stopped to barnstorm. Some telegrams (R. 21) were there interchanged between Lacey and petitioner, Lacey contending that they had reference to the stolen plane; which is disputed by petitioner (R. 70). Lacey returned to Illinois, leaving the plane at Guymon, and the plane was later returned to Illinois by the owner.

Petitioner testified admitting meeting Lacey about the middle of June, 1926, (R. 53), but denies that he ever employed Lacey at all, (R. 57); stated that Lacey brought a plane with him which he claimed was his own, which later turned out to be a plane stolen in Indiana (R. 56), and which he flew during the summer from petitioner's port as a base, on the commission basis customary to transient pilots; that Lacey left his field before October 6th, 1926, (R. 58). Petitioner specifically denied that he knew anything about or had anything to do with the stealing or transportation of the Ottawa plane, or any other plane, (R. 73). He admitted that Lacey alighted at his port; that his plane was serviced, but denies that he, petitioner, was ever personally about the plane or had anything to do with it,

or knew anything about, the changing of any serial numbers or repainting any parts (R. 72); that Lacey advised him and he believed that he was going to McGregor, Iowa, where there was a prospective student pilot (R. 60); that at the request of Lacey, he was instrumental in directing him to some parties where he got a quantity of liquor, which was taken on board his plane at petitioner's port, (R. 60); that he knew nothing of Lacey's going West to Amarillo, Texas, or anywhere else, (R. 73-74); that he understood and thought the word "stock" in the telegrams had reference to liquor (R. 70), and his own telegrams had that only in mind, and denies that he ever had any agreement, as Lacey claims, relative to any code or the use of the word "stock" (R. 70). Petitioner further testified that upon his return to Illinois, Lacey explained his taking of the plane at Ottawa as a secret arrangement between him and Bridgeman, the President of the Company, which petitioner accepted as the real facts in the case. (R. 65-66).

It is the contention of this petitioner that he is a victim of the circumstances of having had trouble with Lacey when he left his port about the first of October, 1926 (R. 58); of Lacey's having alighted at his port with the stolen plane; of the exchange of telegrams; and of a malicious attempt on the part of Lacey, by false testimony, to involve him in the alleged crime.

At the close of the Government's evidence, petitioner moved the court that the jury be instructed to find for him, as defendant, on a plea of not guilty (R. 48). This motion, together with a demurrer to the evidence, was again entered at the close of all of the evidence in the case (R. 105), all of which were overruled by the court. Other motions and exceptions were made and saved during the trial, as indicated by the assignment of errors to the Appeals Court (R. 150-166). The trial was concluded on May 27th, 1929, the jury returning a verdict finding this petitioner, as defendant, guilty as charged in the indictment (R. 4).

Petitioner then filed his motion for new trial (R. 5), which was heard June 29th, 1929. In this motion petitioner urged consideration of the circumstances that notwithstanding the jurisdiction of the State of Illinois of the larceny of the plane, and of the Federal Court of Illinois, under the National Motor Vehicle Theft Act, he was required to come to Oklahoma, a thousand miles from home where he had never been in his life, and where it was impossible for him to bring witnesses and to be prepared to meet whatever story Lacey might choose to tell; that he had no way of knowing what Lacey would testify to, and was therefore unable to meet the Government's evidence. In support of his motion, petitioner introduced a number of witnesses and numerous affidavits (R. 118-147) strongly refuting most of the evidence of Lacey so for as he implicated this petitioner, and showing false testimony in some instances (R. 133-134). This motion was also overruled by the court and exceptions allowed, (R. 9). Petitioner then filed his motion in arrest of judgment on the ground that the indictment did not state a cause of action or show an offense committed against the laws of the United States, and that the court had no jurisdiction of the subject matter of the action or of the defendant, which was also overruled by the court and exceptions allowed, (R. 9).

Thereupon, on the 29th day of June, 1929, said court sentenced the petitioner to imprisonment in the Federal Penitentiary for a term of three years, and to pay a fine of $2,000.00 (R. 9).

Thereafter, petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment and proceedings of the Trial Court on appeal. The following points were raised: (1) Jurisdiction of the Trial Court of the cause of action and person of the defendant (R. 150); (2) Error in introducing certain evidence (R. 151-154); (3) Error in cross examination by the Government (R. 156-159); (4) Abuse of discretion of the Trial Court in overruling defend-

ant's motion for new trial (R. 164). The first and last of these points are urged in this petition.

The Appeals court affirmed the trial court (R. 171), with Circuit Judge Cotteral dissenting on the ground of jurisdiction. In fact, the theory of the Goyernment in this case is clearly indicated by the majority opinion, while the contention of petitioner relative to jurisdiction, is upheld by the dissenting opinion (R. 176).

A certified copy of the entire record of said case in said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application, marked Exhibit "A", in compliance with the rules of this Honorable Court.

This petitioner is advised and believes that said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240, Judicial Code (Act of February 13, 1925).

— B —

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Circuit Court of Appeals, Tenth Circuit, erred in sustaining the legality of the indictment and the jurisdiction of the trial court by holding that the term "motor vehicle", as defined and used in the National Motor Vehicle Theft Act, includes and embraces aeroplanes (R. 172-174).

2. The court below erred in sustaining the jurisdiction of the trial court as to the crime charged in the indictment, in that such decision is in conflict with applicable decisions of the United States Supreme Court and of other Circuits involving similar questions.

3. The court below erred in holding that the trial Court had jurisdiction of the cause, notwithstanding the Fifth

Amendment to the Constitution of the United States, which provides:

> "The trial of all crimes * * * * shall be held in the State where the crimes shall have been committed * * *;"

the contention being that if any crime was committed by the petitioner, McBoyle, it was within the State of Illinois.

4. The court below erred in holding that the trial court did not abuse its discretion in overruling petitioner's motion for new trial. (See R. 175; last paragraph; also R. 164; also Assignment 18).

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record, and all proceedings in the case numbered and entitled on its docket, No. 213, William W. McBoyle, appellant, v. The United States of America, appellee, and that the said judgment of the said Circuit Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

WILLIAM W. McBOYLE, *Petitioner.*
BY HARRY F. BROWN,
Guthrie, Oklahoma,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM-1930

No._____

WILLIAM W. McBOYLE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was filed August 18th, 1930 (R. 171), and will be reported in 43 Federal (2d), 273.

II

JURISDICTION

1. The jurisdiction of this court is invoked under Section 240 (A) of the Judicial Code, as amended by the Act of February 13th, 1925.

2. The judgment of the Circuit Court of Appeals of the Tenth Circuit, to which the petition herein is directed, was entered by the court September 8th, 1930 (R. 177). (Opinion filed August 18th, 1930; R. 171).

3. The indictment in this case, being one under a Federal Statute (R. 2), the National Motor Vehicle Theft Act, and the primary question being one of the jurisdiction of the trial court of the cause of action, this court has jurisdiction to review the decision of the Circuit Court of Appeals, Tenth Circuit, and to determine the question of jurisdiction, and consequently, any allied questions raised in connection therewith. In addition, the question of jurisdiction, as raised in this case, is especially important as a matter of public interest, as it involves aeroplanes, a new and third method of travel, and the decision will doubtless form a precedent to be followed in construing many other statutes in connection with aeroplanes and aeroplane travel.

In addition, the Appeals Court below was divided in its view, as shown by the majority opinion (R. 171) and dissenting opinion (R. 176).

4. In the following cases this Court assumed jurisdiction and they are cited as authority for the Court to assume jurisdiction in this case:

Fasulo v. United States, 272 U. S. 620; 71 L. Ed., 443. The reasoning of this case, Petitioner maintains, should control in the case at bar. The question is similar—construction of a Federal penal Statute.

The question for decision is whether the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm is a scheme to defraud.

In United States v. Noveck, 271 U. S., 201; 70 L. Ed. 905, construction of a penal statute was also involved, and the same reasoning applied.

The following cases are also very applicable:

First Nat. Bank of Anamoose v. United States, 206 Fed., 374. (This case is in line with the above mentioned authorities, and applies the rules of construction hereinafter discussed in this brief).

United States v. Wiltberger, 5 Wheat., 76, 95; 5 L. Ed., 37.

Hammerschmidt v. United States, 265 U. S., 182; 68 L. Ed., 968.

United States v. Chase, 135 U. S., 255; 34 L. Ed., 117.

It will be noted that the majority opinion of the Appeals Court below in this case, on the question of jurisdiction, cites no parallel cases as authority, but appears to rest entirely on broad similarities of usage between aeroplanes and automobiles, and one or two very general definitions.

III

STATEMENT OF THE CASE

The statement of the case has been fully covered under heading "A" in the petition, and in the interest of brevity, is not repeated here.

IV

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals, Tenth Circuit, erred in sustaining the legality of the indictment and the jurisdiction of the trial court by holding that the term "motor vehicle", as defined and used in the National Motor Vehicle Theft Act, includes and embraces aeroplanes. (R. 172-174.)

2. The court below erred in sustaining the jurisdiction of the trial court as to the crime charged in the indictment, in that such decision is in conflict with applicable decisions of the United States Supreme Court and of other Circuits involving similar questions.

3. The court below erred in holding that the trial court had jurisdiction of the cause, notwithstanding the Fifth Amendment to the Constitution of the United States, which provides:

> "The trial of all crimes * * * shall be held in the State where the crimes shall have been committed; * * * *"

the contention being that if any crime was committed by the petitioner, McBoyle, it was within the State of Illinois.

4. The court below erred in holding that the trial court did not abuse its discretion in overruling petitioner's motion for new trial. (See R. 175; last paragraph; also R. 164; Assignment 18).

V

ARGUMENT.

The above errors will be concisely discussed in their order.

ERROR 1

The term "motor vehicle" does not include nor embrace the word aeroplane, and the indictment does not state a Federal offense and is therefore void, and the trial court is without jurisdiction.

For convenience, we again quote the definition of motor vehicle as contained in the Act:

> "408 * * * The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails". (Title 18, Sec. 408, U. S. Crim. Code).

The theories of the Government and of petitioner are clearly indicated by the following excerpts from the majority and dissenting opinions of the appeals court below in this case:

> "We conclude that the phrase 'any other self-propelled vehicle' includes an aeroplane, a motor boat and any other like means of conveyance or transportation which is self-

propelled and is of the same general class as an automobile and a motorcycle." (Majority Opinion, R. 174.)

"I am constrained to hold that aeroplanes were not meant by the Act to be embraced in the designation of motor vehicles, and that the indictment charged no offense against the defendant." (Dissenting opinion, R. 177).

In construing the statute, the following points must be observed:

First: The crime was not one at common law, and since the Courts of the United States do not resort to the common law as a source of criminal jurisdiction, the Government must look wholly to the Act for the foundation of its case.

U. S. v. Eaton, 144 U. S. 677; 36 L. Ed., 591.

Second: The language of the act must clearly indicate the crime charged.

Third: Being a penal statute, the Act must be strictly construed.

Fourth: The Act must be construed in the light of the doctrine of ejusdem generis.

Fifth: The intention of Congress is indicated by the history of the Act in debates, etc.

Sixth: Special legislation relative to aeroplanes.

Petitioner maintains that the Appeals Court below not only erred in its decision that the term "motor vehicle" includes aeroplanes, but that it erred in applying the above well established rules of construction.

The Language of the Act Does Not Clearly Indicate the Crime Charged

"There are no constructive offenses; and, before one can be

punished, it must be shown that his case is plainly within the statute. United States v. Lacher, 134 U. S., 624, 628; 33 L. Ed., 1080, 1083; 10 Sup. Ct. Rep., 625." (Fasulo v. Unitel States, 272 U. S., 620; 71 L. Ed., 443).

"Statutes will not be read to create crimes, or new degrees or classes of crimes, unless the purpose so to do is plain." (United States v. Noveck, 271 U. S., 201; 70 L. Ed., 905).

"Regard is always to be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress. United States v. Lacher, 134 U. S., 624, 628; 33 L. Ed., 1080, 1083; 10 Sup. Ct. Rep., 625; Todd v. United States, 158 U. S., 278, 282; 39 L. Ed., 982, 983; 15 Sup. Ct. Rep., 889; Fasulo v. United States, 272 U. S., 620, 629; 71 L. Ed., 443, 445; 47 Sup. Ct. Rep., 200." (Donnelley v. U. S., 276 U. S., 511; 72 L. Ed., 678).

"(1) The statute creates and denounces a new offense. A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. * * * An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expressions or by the expunging of some of its words by the judiciary. Ex post facto construction is as vicious as ex post facto legislation.

* * *

The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden signification reached by the reflection and ingenius reasoning of unusually strong and acute minds." (First Nat. Bank of Anamoose v. United States, 206 Fed., 374).

The Act does not contain the word "aeroplane"; neither does it contain any similar words, such as "aircraft," "airship," "flying machine," etc. On the other hand, the specific terms used in the Act apply only to automobiles and like con-

veyances. In order, therefore, for an aeroplane to be embraced in the Act, it is necessary to read the word "aeroplane" or some similar word into it by judicial construction of the definition of a "Motor vehicle" as contained therein.

The word "vehicle" and the term "motor vehicle" in so far as they apply to conveyances, have been applied universally to vehicles that travel on land, both in their common and legal usage.

The following definitions of "vehicle" are pertinent here:

"4. 'Vehicle', as Including All Means of Land Transportation. The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land. Sec. 4, Title 1, of the U. S. Code."

"Vehicle 1. That in or which anything is or may be carried; especially a contrivance with wheels or runners for carrying something. A conveyance as a carriage, wagon or car; SPECIFIC, IN LAW, ANY ARTIFICIAL CONTRIVANCE USED OR CAPABLE OF BEING USED AS A MEANS OF TRANSPORTATION ON LAND." Standard Dictionary Ed., 1928.

Cyc. states:

"Vehicle. Any carriage moving on land, either on wheels or on runners; * * * " (39 Cyc., 1125.)

The footnote to the above text on vehicles reads as follows:

"The term is rarely applied to water craft and does not therefore apply to a ferry-boat." (Duckwell v. New Albany, 25 Ind., 283, 286.)

"Railroad cars which only run on a permanent, continuous and connecting track are not 'vehicles' in the ordinary and usual sense of the term." (Baltimore, etc., R. Co. v. District of Columbia, 10 App. Cas.) (D. C. 111, 120.)

The opinion of the court below cites the definition of

"vehicle" in the Century Dictionary, as follows:

> "F. Vehicle, L. Vehiculum", meaning a 'conveyance, carriage, ship.' It defines the word as, 'Any receptacle, or means of transportation, in which something is carried or conveyed or travels." (R. 172.)

The above definition, however, is followed by the following definition:

> "Esp. A carriage or conveyance moving on wheels or runners;" • • •

Definition and use of the term "Motor Vehicle"

This term apparently came into existence with the automobile, and in its legal and common usage has been entirely confined to the automobile and like motor-driven conveyances that travel on the ground.

VOLUME 28 OF "CYC", copyrighted in 1908, devotes some 30 pages to the subject of "motor vehicles". In this article, the term is used synonymously with the word "automobile", and like vehicles, and is confined exclusively to such conveyances.

IN VOLUME 42 OF CORPUS JURIS, copyrighted in 1927, eight years after the passage of the National Motor Vehicle Theft Act, 843 pages (563 to 1410) are devoted to the subject of "motor vehicles". In the 800 pages of this exhaustive discussion, nothing but automobiles and like conveyances that run upon the ground are discussed or referred to. A cursory examination of each page of the article indicates that the word "aeroplane" was never used in the text nor in the numerous notes on each page. The author seems to assume as a matter of course, that the term "motor vehicle" applies only to automobiles and like conveyances.

VOLUME 2 OF CORPUS JURIS, on the other hand, treats of "Aerial Navigation". An examination of the ten pages of this article and the numerous notes accompanying it, so far as we

are able to find, does not disclose the use of the term "motor vehicle" even once. It is simply not thought of in that connection.

In Ruling Case Law, Vol. 19, Page 677, the following index appears: "Motor Vehicles. See automobiles, Vol. 2, p. 1164."

The New International Encyclopedia, in Vol. *16*, copyrighted in 1917, devotes 13 pages (337 to 350) to the discussion of the subject of "motor vehicles". It defines the term as follows:

"Motor Vehicle (Ger. Motor-Wagon). 'A carriage for the transportation of passengers or a truck for transportation of freight, fitted to run on streets and highways without a track. * * * *"

The above definition is followed by an exhaustive discussion, both historic and scientific, of automobiles and like conveyances that run upon the ground, with many drawings of automobiles, etc. But there seems to be no reference that would in any way connect the term "motor vehicle" with any form of aircraft.

Volume 1, of the International Encyclopedia, pages 172 to 187, on the other hand, treats of "Aeronautics", but the term "motor vehicle" is never used therein.

The Air Commerce Act of the United States (Sec. 176-1 to 176-14, Title 49, U. S. Code), approved May 20, 1926, seven years after the passage of the National Motor Vehicle Theft Act, never in any instance makes use of the term "motor vehicle." It uses a terminology distinctly belonging to airplanes, such as "aircraft," "airspace," "airworthiness," "air navigation," "airports," and "navigable airspace." It also has the following provision relative to the words "vessel", and "vehicle":

"(a) The navigation and shipping laws of the United

States, including any definition of "vessel," or "vehicle," found therein * * * shall not be construed to apply to seaplanes or other aircraft. (Title 49, Sec. 176, U. S. Code.)

IN THE STATUTES OF THE VARIOUS STATES, the laws applicable to automobiles and like conveyances are invariably listed under the subject of "motor vehicles."

In Kansas, for instance, Chapter 206, Statutes of 1925, begins as follows:

"Section 1. (a) The term 'motor vehicle,' when used in this act, means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or track."

In the Code of Iowa, 1927, 251, entitled "motor vehicle and law of Road," a motor vehicle is defined as follows:

"1. The term 'motor vehicle' shall include all vehicles, propelled by any power other than muscular power except traction engines, road rollers, and such vehicles as are run only upon tracks or rails."

An examination of the statutes of some fifteen or twenty of the states, including Massachusetts and New York, shows that the subject is treated in a similar manner, under the term "motor vehicles," and it is reasonable to conclude that it is likewise true of the other states.

The above definition from Kansas is almost identical with the definition found in the National Motor Vehicle Theft Act, but it could not possibly be construed to apply to airplanes, as the act treats of regulations peculiar to automobiles and like conveyances that use the roads, with no thought otherwise.

The Court below quotes as authority in construing the term "motor vehicle," Corpus Juris, Volume 42, page 609, Sec. 1, (R. 173) which reads as follows:

"A 'motor vehicle' is a vehicle operated by a power devel-

oped within itself and used for the purpose of carrying passengers or materials; and as the TERM IS USED IN THE DIFFERENT STATUTES regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracts.

The real meaning of the definition is determined, however, by the authorities on which it is based. An examination of these authorities shows that invariably the subject matter has to do with automobiles or like conveyances that run on the ground. Then too the definition is followed by 800 pages of data dealing entirely with principles, statutes and decisions concerning automobiles, and like vehicles, and none of which apparently deal with aircraft, directly or indirectly. This situation certainly eliminates aeroplanes or aircraft of any kind from classification under the above definition of a "motor vehicle."

THE RULE OF STRICT CONSTRUCTION APPLIES TO THIS ACT.

"301. General Rules. It has long been the well settled general rule that penal statutes are subject to the rule of strict construction. They will not be construed to include anything beyond their letter even though within their spirit, and nothing can be added to them by inference or intendment." (25 R. C. L. 1081).

In view of the fact that Congress, in enacting the Act, failed to use the word "aeroplane," or any similar word that indicates an intention to make the Statute applicable to aeroplanes, and since the term "motor vehicle," has universally been applied to automobiles and other vehicles running upon the ground, petitioner maintains that the application of the above rule eliminates aeroplanes from consideration in construing the act. But there is a further rule to consider that should eliminate all question.

The doctrine of Ejusdem Generis.

This doctrine is well defined by "Cyc."

"(11) Doctrine of Ejusdem Generis. By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. * * * (36 Cyc. 1119).

"2. Statutes—Construction—Ejusdem Generis—Definition of Crime. The rule that, where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class of those enumerated, is especially applicable to statutes defining crimes and regulating their punishment." (Opinion, Circuit Judge Sanborn, First Nat. Bank of Anamoose, v. U. S., 206 Fed., 374).

The following case applies the doctrine in a manner most applicable to this case:

"This aeroplane as operated by Whitted cannot be called a common carrier of passengers. It cannot be designated a public conveyance, provided by a common carrier for passenger service only, as the policy contract contemplated. The connection in which these general words are used with the other conveyances mentioned in the policy contract strengthens this conclusion. The conveyances mentioned in the policy are 'railroad car, steamboat, automobile, omnibus, or cab'; and then follows the more general words or phrase, 'or other public conveyance provided by a common carrier for passenger service only'. THIS AEROPLANE IS NOT A CONVEYANCE OF THE SAME KIND OR SPECIES AS THE OTHERS ENUMERATED IN THE POLICY CONTRACT. IT WAS USED TO FLY IN THE AIR; AND THE OTHER CONVEYANCES ENUMERATED ARE USED ON LAND OR WATER." No. Am. Acci. Ins. Co. v. Pitts (Ala.), 104 So. 21, 40 A. L. R., 1171."

The words of the statute to which this doctrine is applicable are as follows:

> "The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, OR ANY OTHER SELF PROPELLED vehicle not designed for running on rails."

Under this doctrine the phrase "any other self propelled vehicle not designed for running on rails" must be confined in its application to the general class of vehicles to which the words "automobile, automobile truck, automobile wagon, motorcycle", belong.

The important thing about an aeroplane that differentiates it from all other modes of travel is the fact that it flies,—not that it moves by means of a motor. The aeroplane is thus placed in a class by itself. The dissenting opinion in the court below states this most forcibly:

> "It would have been a simple matter in enacting the statute to insert as descriptive words, airplanes, aircraft, or flying machines. If they had been in the legislative mind, the language would not have been expressed in such uncertainty as 'any other self-propelled vehicle not designed for running on rails.' The omission to definitely mention airplanes requires a construction that they were not included. Furthermore, by excepting vehicles running on rails, the meaning of the Act is clarified. These words indicate it was meant to be confined to vehicles that run but not on rails, and it did not extend to those that fly. Is it not an unreasonable view that airplanes fall within the description of self-propelled vehicles that do not run on rails? The question is its own answer." (R. 176).

The majority opinion of the court below states (R. 173, last paragraph):

> "Furthermore, some meaning must be ascribed to the general phrase 'any other self propelled vehicle', which Congress wrote into the Act. IT SPECIFICALLY ENUMERATED

ALL OF THE KNOWN SELF-PROPELLED VEHICLES DESIGNED FOR RUNNING ON LAND."

In this, the court below would seem to be in error. There are a number of other words of rather common usage applying to automobiles and like conveyances, such as "motor car", (Ency. Brittanica), "motor bus", (Winston's Enc. 1929, Vol. 7), "motor carriage", (Appelton's new Pract. Ency. 1920, Vol. 4), "bus", "car", "roadster", "coupe", "phaeton", "sedan", "lemousine", "brougham", (See Cut. Standard Dictionary, 1618-1619).

It is obvious, therefore, that Congress intended the phrase "any other self-propelled vehicle not designed for running on rails" as a catch-all to include, in addition to the words "automobile, automobile truck, automobile wagon and motorcycle", any new trade or coined names that might be applied to the same or similar conveyances, such as those last mentioned above.

The opinion of the court below is so sweeping as to include not only aeroplane, but a motor boat. The same reasoning would include a Zeppelin as a "motor vehicle", since it is propelled by motors. This reasoning is untenable.

Land travel has its own terminology, such as "wagons", "carts", "automobiles", "motor vehicles", "cars", "trains", etc.; water travel has its own terminology, such as "vessels", "ships", "motor boats", "liners", etc. It remained for the Twentieth Century to develop the first new mode of travel in history,—that by air. This new method of travel is likewise developing a new terminology of its own, such as "aeroplanes", "airships", "flying machines", "Zeppelin", etc. It is confined neither to land nor to water in its operations. Colonel Lindbergh used the same aeroplane in crossing the Atlantic that he used in flying over North and South America. It is obvious, therefore, that the aeroplane can not be classed either with automobiles or motor boats, and is not a "motor vehicle" within the meaning of the Act.

The Purpose of Congress is conclusively shown by the Debates

"That such was the purpose is established by the Congressional Debates. 58 Cong. Rec. pt., 5, pp. 4577-4585; 66 Cong. 1st Sess." (Work v. Braffet, 276 U. S., 560, 566; 72 L. Ed., 700, 703).

The debates in connection with the passage of this Act show conclusively that it was not the purpose of Congress to include aeroplanes. Some fifteen or twenty members in the House and Senate took part in the discussion, including Mr. Dyer, Author of the Act, and Senators Cummins, Brandegee and Hitchcock. The word "aeroplane" does not appear once, nor is there any reference, directly or indirectly to aircraft of any kind. On the other hand, by actual count, the word "automobile" appears more than eighty times.

The following short quotations are from the remarks of Mr. Dyer, author of the Act, and are indicative of the thoughts expressed generally:

"It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one state to another. Section 5 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it." (Cong. Rec. Vol. 58, Pt. 6, 5472).

"This bill has been given very careful consideration by the Committee on the Judiciary. The full committee, with the earnest desire to present to the House a measure that would as far as possible wipe out the numerous stealings of automobiles, gave most careful consideration to the same. (Page 5472).

"At the present time there is a great emergency demanding this kind of legislation. In the United States at this time there are in use approximately 6,500,000 automobiles. During the past year the number of thefts of automobiles has been very large throughout the United States, and particularly in cities of the Middle West. * * * It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft

insurance, due to the great loss that insurance companies have sustained. During the past year automobile insurance on this class of cars has increased 100 percent." (Page 5470). (See Appendix for further quotations.)

None of the reasons advanced for enacting the law applied to aeroplanes, and do not apply today. Perhaps in the whole ten years since the passage of the law, there have not been a half dozen aeroplanes stolen and transported. The larceny laws of the various states are now and perhaps always will be amply sufficient to take care of the theft of aeroplanes, without the aid of the Federal Courts. (The House debates appear on pages 5470 to 5478, Vol. 58, part 6, Cong. Rec.; the Senate debates on pages 6433 to 6435, Vol. 58, part 7.

Air Commerce Act of 1926

The term "motor vehicle" does not appear in this Act; in addition, by its provisions, the National Government assumes regulatory powers of aircraft and pilots to such an extent that the theft of planes is bound to be negligible. The Dyer Act, including the National Motor Vehicle Theft Act, the white slave act, etc., seems to apply only to subjects over which the Federal Government has no regulatory powers but where violations of law have gotten beyond the control of the states owing to interstate transportation.

In view of the foregoing reasons, petitioner submits that the term "motor vehicle" can not properly be construed to apply to aeroplanes, that the indictment does not state a Federal offense, and that the Circuit Court below is in error in so holding; and that the dissenting opinion in the case correctly states the law.

ERROR 2.

The Court below erred in that its decision is not in accord with applicable decisions of the Supreme Court and other Circuit Courts.

An examination of the majority opinion of the court below shows that the portion of the opinion holding that an aero-

plane is enibraced within the term "motor vehicle" is based on a rather loose definition of the word "vehicle" (R. 172), and of "motor vehicle" as defined by Corpus Juris, Volume 42, Page 609, R. 173, and upon the similarity of the purposes of the aeroplane and automobile. The opinion does not cite a case where this or other courts have passed upon a parallel situation in the same way.

On the other hand, the following cases, petitioner believes, sustain his contention in this case so fully that they should have controlled the decision.

Fasulo v. United States, 272 U. S., 620; 71 L. Ed., 443.

United States v. Noveck, 271 U. S. 201; 70 L. Ed., 905.

First Nat. Bank of Anamoose v. U. S., 206 Fed., 374.

Petitioner therefore maintains the court below erred in that its decision is contrary to the foregoing applicable decisions.

ERROR 3.

The court erred in holding that the trial court had jurisdiction of the cause notwithstanding the Fifth Amendment to the Constitution of the United States, providing that "the trial for all crimes * * * shall be held in the state where the crimes shall have been committed * * * ".

It is the contention of the petitioner that even assuming that he did the acts complained of, which he specifically denies, the jurisdiction of the crime was in the State of Illinois. As shown by the statement of facts, the defendant McBoyle was never in the plane, had nothing to do with its actual transportation, and was never out of the State of Illinois. The record fails to show, even on the Government's theory, that petitioner intended for the plane to be brought to Oklahoma.

The Statute provides:

"Whoever shall transport or cause to be transported in interstate or foreign commerce", etc.

It also provides:

> "Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

There are a number of decisions that hold or tend to hold that persons charged with penal acts in connection with the interstate transportation of goods, may be tried at the destination of goods or articles instead of at the point of shipment as in post office cases. There seems to be a difference in these cases in this, that the evidence shows that the particular jurisdiction of the court included the point of intended destination. In this case, on the Government's theory, Lacey went to Oklahoma without petitioner's knowledge or consent. He could just as well have gone to the State of Maine or the State of Washington, in which event, petitioner would have been required to go two or three thousand miles from his home, and the place where his alleged acts took place, for trial.

This system, it seems to us, violates every principle of natural justice and right; and also violates the provisions of the Sixth amendment to the Constitution of the United States, quoted above, and likewise of the Fifth Amendment, which provides that:

> "No person * * * shall * * * be deprived of life, liberty or property without due process of law, * * * *."

Under the Government's theory, that petitioner instructed Lacey to take the aeroplane from Illinois, jurisdiction could be fastened upon him in any State of the Union where Lacey decided to fly, regardless of whether he (McBoyle) intended such transportation to be made.

This is stretching the matter of jurisdiction too far. Petitioner maintains that if the court finds the National Motor Vehicle Theft Act embraces aeroplanes, that the Federal Court of Illinois only had jurisdiction of the cause and of the defendant.

ERROR 4.

The court below erred in holding that the trial court did not abuse its discretion in denying defendant's motion for new trial.

At the hearing of the motion for new triel, petitioner introduced a mass of evidence, both of personal witnesses and by affidavits, which tended strongly to controvert the story of Lacey in almost every particular, and which showed that he falsified his testimony in some material points, especially with regard to his discharge from the Marines. (R. 133 to 134).

In view of the fact that the Government's case was based primarily on the testimony of an accomplice, and since petitioner was required to leave the State of Illinois and come to Oklahoma, almost a thousand miles, without knowing what evidence he was to meet until the co-defendant told his story on the stand; and in view of the very remarkable quality and extent of the evidence introduced on the hearing of the motion for new trial, as shown by the record, pages 118 to 147, tending strongly to show the story of Lacey false, and that the petitioner is innocent, petitioner maintains that the trial court abused its discretion in denying this motion.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the jurisdiction of the trial court of the cause of action and of the defendant, may be determined, and in order that the National Motor Vehicle Theft Act may be construed as to its application to aeroplanes; and that to such an end, a writ of certiorari should be granted, and this court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit, and finally reverse it.

HARRY F. BROWN,
Guthrie, Oklahoma,
Counselor for Petitioner.

APPENDIX

The National Motor Vehicle Theft Act (the Dyer Act) reads as follows:

408. MOTOR VEHICLES—TRANSPORTATION, ETC., OF STOLEN VEHICLES. This section may be cited as the National Motor Vehicle Theft Act. *The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;* the term 'interstate or foreign commerce' shall include transportation from one state or territory, or the District of Columbia, to another state, territory, or the District of Columbia, or to a foreign country, or from a a foreign country to any state, territory, or the District of Columbia. *Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both.* Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender; (Title 18, Sec. 408, U. S. Criminal Code of Procedure).

EXCERPTS FROM DEBATES IN CONGRESS DURING ENACTMENT OF THE NATIONAL MOTOR VEHICLE THEFT ACT

(House debates appear on Pages 5470 to 5478, Vol. 58, Part 6, of the Congressional Record; and the Senate debates appear on Pages 6433 to 6435, Vol. 58, Part 7).

"MR. DYER: It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one state to another. Section 4 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it" (Cong. Rec. Vol. 58, Part 6, page 5472).

* * * * * * * * * * *

"This bill has been given very careful consideration by the Committee on the Judiciary. The full committee, with the earnest desire to present to the House a measure that would as far as possible wipe out the numerous stealings of automobiles, gave most careful consideration to the same. Prior to doing so it was considered by a subcommittee of the Committee on the Judiciary, and after its consideration by the full committee and after a number of meetings changes were made in it from time to time, and the bill as finally agreed upon was introduced by me and given its present number. But prior to this the bill had been considered in substantially the same form for some time, and at a meeting some time ago the Committee on the Judiciary directed that my bill be reported to the House favorably and unanimously."

* * * * * * * * * * *

"At the present time there is a great emergency demanding this kind of legislation. In the United States at this time there are in use approximately 6,500,000 automobiles. During the past year the number of thefts of automobiles has been very large throughout the United States, and particularly in some cities of the Middle West. In Chicago 2,500 thefts of this kind have occurred. St. Louis has had 2,241 automobiles stolen, and other cities in proportion. * * * It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 per cent. It is automobiles of that price that are generally stolen. Automobile thieves who make a spe-

cialty of this crime do not steal many of the higher-priced cars, the reason being, of course, that they are not so easily sold. * * * Thieves have found the automobile field one in which they can reap huge harvests, due to the fact, no doubt, that there are so many automobiles now in use in the United States" (Cong. Record, pp. 5470-5471).

"MR. REAVIS: Bearing in mind that the offense defined by this measure is the transportation of a *stolen automobile* from one State to another, * * * " (Cong. Record, Vol. 58, part 6, p. 5472).

"MR. BEE: Another suggestion that occurs to me is why single out automobiles? I make no appeal merely because it is an automobile, for the automobile is the vehicle of everybody. But why should a man be permitted to take a carload of cattle and transport them from Texas to Missouri and have the authorities go through the slow process of extradition by the governor before he can be brought back into the State of Texas? Why should we not include a carload of grain that might be stolen, or a bale of cotton, or a carload of hogs, or hundreds of other things that might be mentioned, * * * " (Cong. Record, Vol. 58, part 6, p. 5474).

"MR. CUMMINS: I ask unanimous consent for the present consideration of the bill (H. R. 9203) to punish the transportation of stolen motor vehicles in interstate or foreign commerce."

"MR. SMOOT: Let the bill be read.

* * * * * * * * * * *

"MR. CUMMINS: This is a House bill, and the Senate committee accepted in the main the work of the House. I see no substantial objection, however, to the point made by the Senator from Connecticut. The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further

practice is, if possible, to dispose of the vehicle to some other party, confederate, or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached.

"MR. HITCHCOCK: I realize that what the Senator says is true; but it seems to me a large number of automobile thefts are chiefly for the purpose of sale; most of the men who steal automobiles sell them; it is a regular business. If every sale must be under a certificate and must be registered, without any regard to interstate commerce or passing from one State to another, it seems to me it might be possible to put a stop to that illegitimate business". (Cong. Rec. Vol. 58, Part 7, pages 6434 and 6435).

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IN THE

Supreme Court of the United States

WILLIAM W. McBOYLE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. 552

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

WILLIAM W. McBOYLE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. 552

BRIEF FOR PETITIONER

I

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was filed August 18th, 1930 (R. 171), and is reported in 43 Federal (2d), 273.

II

JURISDICTION

1. The jurisdiction of this court is invoked under Section 240 (A) of the Judicial Code, as amended by the Act of February 13th, 1925.

2. The judgment of the Circuit Court of Appeals of the Tenth Circuit, here in question, was entered by the

court September 8th, 1930 (R. 177). (Opinion filed August 18th, 1930; R. 171).

3. The indictment in this case, being one under a Federal Statute (R. 2), the National Motor Vehicle Theft Act, and the primary question being one of the jurisdiction of the trial court of the cause of action, this court has jurisdiction to review the decision of the Circuit Court of Appeals, Tenth Circuit, and to determine the question of jurisdiction. This question is especially important as a matter of public interest, as it involves aeroplanes, a new and third method of travel, and the decision will doubtless form a precedent to be followed in construing many other statutes in connection with aeroplanes and aeroplane travel.

In addition, the Appeals Court below was divided in its view, as shown by the majority opinion (R. 171) and dissenting opinion (R. 176).

4. In the following cases this Court assumed jurisdiction and they are cited as authority for the Court to assume jurisdiction in this case:

Fasulo v. United States, 272 U. S. 620; 71 L. Ed., 443. The reasoning of this case, Petitioner maintains, should control in the case at bar. In this case construction of a Federal penal statute was also involved, the question being whether the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm is a scheme to defraud.

In United States v. Noveck, 271 U. S., 201; 70 L. Ed. 905, construction of a penal statute was also involved, and the same reasoning applied as in the Fasulo case.

The following cases are also very applicable:

First Nat. Bank of Anamoose v. United States, 206 Fed., 374. (This case is in line with the above mentioned authorities, and applies the rules of construction hereinafter discussed in this brief).

United States v Wiltberger, 5 Wheat., 76, 95; 5 L. Ed., 37.

Hammerschmidt v. U. S., 265 U. S. 182; 68 L, Ed. 968.

United States v. Chase, 135 U. S., 255; 34 L. Ed., 117.

It will be noted that the majority opinion of the Appeals Court below in this case, on the question of jurisdiction, cites no parallel cases as authority, but appears to rest entirely on broad similarities of usage between aeroplanes and automobiles, and one or two very general definitions.

STATEMENT OF THE CASE

The question in this case before this Honorable Court is one of jurisdiction of the trial court. The case arose by indictment filed in the District Court of the Western District of Oklahoma, on January 18th, 1928 (R2), in which this petitioner, William W. McBoyle, was jointly charged with one A. J. "Steve" Lacey, alias Pat Sullivan, under the National Motor Vehicle Theft Act, with transporting an areoplane, on October 10th, 1926, from Ottawa, in the State of Illinois, to Guymon, in the Western District of Oklahoma, knowing the same to have been stolen.

The pertinent portions of the Act applicable to this case are as follows:

"408. **Motor Vehicles**—Transportation, Etc., of Stolen Vehicles. This section may be cited as the **National Motor** Vehicle Theft Act. The term

> **'motor vehicle'** when used in this section, shall in-include **an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;** * * * Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a **motor vehicle,** knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both * * *." (Title 18, Sec. 408, U. S. Criminal Code of Procedure; See Appendix).

It will be noted that the word "aeroplane" does not appear in the Act; nor are any similar words, such as aircraft, airship, or flying machine, used. The legality of the indictment, and consequently, the jurisdiction of the trial court, depends upon the construction placed upon the term "motor vehicle" as used and defined in the Act. In other words, does the language of the National Motor Vehicle Theft Act quoted above include and embrace aeroplanes? The instruction (R. 112) of the trial court to the jury on this point was as follows:

> "It is true that the term aeroplane is not used in this section, but you are instructed the term aeroplane is included in the term 'motor vehicle', as used in this statute."

The majority opinion (R. 171) of the Circuit Court of Appeals for the Tenth Circuit, sustained the contention of the Government and affirmed the trial court on all of the assignments of error, including those raising the question of jurisdiction (R. 150), thus, in effect, holding that the term "motor vehicle" includes areoplanes (R. 174).

Circuit Judge John H. Cotteral dissented from the majority opinion, holding that an aeroplane is not a mo-

tor vehicle within the meaning of the National Motor Vericle Theft Act, and that the trial court was therefore without jurisdiction. (R. 176).

THE FACTS

The detailed facts are not pertinent in considering the question of law before this court, but the following brief statement is made to show the nature of the case.

The transportation of the plane in question took place from October 6th, 1926, to October 10th, 1926, (R. 16), although the indictment was not filed until about a year later when the defendant Lacey was apprehended in Montana with a plane subsequently stolen by him from Minneapolis, Minnesota, (R. 35). He was then returned to Oklahoma under warrant charging him with the illegal transportation of the Ottawa, Illinois, plane on which this case is based. Lacey then related his story, admitting the charge and implicating McBoyle in the transportation of the Illinois plane, which led to petitioner's indictment with Lacey in this case. Lacey later pleaded guilty, and was sentenced to serve a year in the penitentiary at Chillicothe, Ohio, (said sentence to run concurrently with a former sentence from the State of Indiana, (R. 35). The trial of McBoyle, this petitioner, did not come on until the 24th day of May, 1929, at which time Lacey had been released from the penitentiary under both of his sentences, and appeared as a witness in this case. The Government relied almost wholly on Lacey for its testimony against this petitioner. The situation is clearly indicated by the following comment of the trial court to the jury (R. 116).

> "Now, gentlemen, it largely resolves itself into a situation of whether you believe the testimony of the

defendant McBoyle, or whether you believe the testimony of Lacey."

Lacey testified on behalf of the Government that he first met this petitioner, McBoyle, about the 1st of July, 1926; that he was employed by petitioner during the summer as a pilot at $35.00 a week and commission (R. 16); that he stole the plane at Ottawa, Illinois, on October 6th, 1926, and flew it to the petitioner's airport at Galena, Illinois, (R. 17), but states that he did so as the employe of and at the direction of this petitioner (R. 16); that while the plane was being serviced at the port, the petitioner filed off the serial number of the plane (R. 17) and repainted a fitting (R. 18); that he, Lacey, then proceeded West, at the request of petitioner, intending to go to Amarillo, Texas; that he stopped at two or three places en route, and in passing over Guymon Oklahoma, on October 10th, 1926, he noticed a fair and stopped to barnstorm. Some telegrams (R. 21) were there interchanged between Lacey and petitioner, Lacey contending that they had reference to the stolen plane, which is disputed by petitioner (R. 70). Lacey returned to Illinois, leaving the plane at Guymon, and the plane was later returned to Illinois by the owner.

Petitioner in his defense testified that he first met Lacey about the middle of June, 1926, (R. 53), but denies that he ever employed Lacey at all, (R. 57); stated that Lacey brought a plane with him which he claimed was his own, which later turned out to be a plane stolen in Indiana (R. 56), and which he flew during the summer from petitioner's port as a base, on the commission basis customary to transient pilots; that Lacey left his field before October 6th, 1926, (R. 58). Petitioner specifically denied that he knew anything about or had anything to

do with the stealing or transportation of the Ottawa plane, or any other plane, (R. 73). He admitted that Lacey alighted at his port; that his plane was serviced, but denies that he, petitioner, was ever personally about the plane or had anything to do with it, or knew anything about, the changing of any serial numbers or repainting any parts (R. 72); that Lacey advised him and he believed that he was going to McGregor, Iowa, where there was a prospective student pilot (R. 16); that at the request of Lacey, he was instrumental in directing him to some parties where he got a quantity of liquor, which was taken on board his plane at Petitioner's port, (R. 60); that he knew nothing of Lacey's going West, either to Amarillo, Texas, or elsewhere. (R. 73-74); that he understood and thought the word "stock" in the telegrams had reference to liquor (R.70), and his own telegrams had that only in mind, and denies that he ever had any agreement, as Lacey claims, relative to any code or the use of the word "stock" (R. 70). Petitioner further testified that upon his return to Illinois, Lacey explained his taking of the plane at Ottawa as a secret arrangement between him and Bridgeman, the President of the Company, which petitioner accepted as the real facts in the case. (R. 65-66).

It is the contention of this petitioner that he is a victim of the circumstances of having had trouble with Lacey when he left his port about the first of October, 1926 (R. 58); of Lacey's having alighted at his port with the stolen plane; of the exchange of telegrams; and of a malicious attempt on the part of Lacey, by false testimony, to involve him in the alleged crime.

At the close of the Government's evidence, petitioner moved the court that the jury be instructed to find for him, as defendant, on a plea of not guilty (R.48). This

motion, together with a demurrer to the evidence, was again entered at the close of all of the evidence in the case (R. 105), all of which were overruled by the court. The trial was concluded on May 27th, 1929, the jury returning a verdict finding this petitioner, as defendant, guilty as charged in the indictment (R. 4).

Petitioner then filed his motion for new trial (R. 5), which was heard June 29th, 1929, and overruled. He then filed his motion in arrest of judgment on the ground that the indictment did not state a cause of action or show an offense committed against the laws of the United States, and that the court had no jurisdiction of the subject matter of the action or of the defendant, which was also overruled by the court and exceptions allowed, (R. 9).

Thereupon, on the 29th day of June, 1929, said court sentenced the petitioner to imprisonment in the Federal penitentiary for a term of three years, and to pay a fine of $2,000.00 (R. 9).

Thereafter, petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment and proceedings of the Trial Court.

As stated above the Appeals court affirmed judgment of the trial court (R. 171), with Circuit Judge Cotteral dissenting on the ground of jurisdiction. In fact, the theory of the Government in this case is clearly indicated by the majority opinion, while the contention of petitioner relative to jurisdiction, is upheld by the dissenting opinion (R. 176).

This Honorable Court, in granting the Petition for Writ of Certiorari to the Appeals Court below, limited consideration to the question of whether the National

Motor Vehicle Theft Act applies to aircraft. The following brief is therefore limited to a discussion of this question of law:

IV

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals, Tenth Circuit, erred in sustaining the legality of the indictment and the jurisdiction of the trial court by holding that the term "motor vehicle," as defined and used in the National Motor Vehicle Theft Act, includes and embraces aeroplanes. (R. 172-174).

(The foregoing Error, to which this hearing is confined, includes the points raised in errors one, two, three, four, five and six (R. 150-151), and 19 (R. 166) assigned in the Court below, and all of which question the jurisdiction of the trial court, and the legality of the indictment.

The jurisdiction of the trial court was raised during the trial of the case by the following motions and demurrers: First, by motion at the close of the Government's evidence, that the jury be instructed to find for defendant on a plea of not guilty (R. 48); second, by renewal of this motion, and by demurrer to the evidence, entered at the close of the evidence of the case (R. 105); third, by motion for a new trial (R. 5); fourth, by motion in arrest of judgment on the ground that the indictment did not state a cause of action or show an offense committed against the laws of the United States, and that the court had no jurisdiction of the subject matter of the action or of the defendant (R. 9). All such motions and demurrers were overruled by the trial court, and exception allowed.)

V

ARGUMENT AND AUTHORITIES

The foregoing Assignment of Error raises the only question before this Court. This assignment is reducible to the following proposition:

THE TERM "MOTOR VEHICLE," AS USED IN THE NATIONAL MOTOR VEHICLE THEFT ACT, DOES NOT INCLUDE OR EMBRACE AEROPLANES, AND THE INDICTMENT DOES NOT STATE A FEDERAL OFFENSE AND IS THEREFORE VOID, AND THE TRIAL COURT IS WITHOUT JURISDICTION

The Theories of the Government and of Petitioner are clearly indicated respectively by the following excerpts from the majority and dissenting opinions of the Appeals Court below in this case:

> "We conclude that the phrase 'any other self-propelled vehicle' includes an aeroplane, a motor boat and any other like means of conveyance or transportation which is self-propelled and is of the same general class as an automobile and a motorcycle." (Majority opinion, R. 174).
>
> "I am constrained to hold that aeroplanes were not meant by the Act to be embraced in the designation of motor vehicles, and that the indictment charged no offense against the Government." (Dissenting opinion, R. 177).

In urging the foregoing proposition, the Petitioner relies upon the following seven points:

1. Being a penal statute, the Act must be strictly construed.

2. The language of the Act does not clearly indicate the crime charged.

3. The language of the Act, in the light of both legal and general usage shows conclusively that aeroplanes were not intended to be embraced in the Act.

4. Under the Doctrine of Ejusdem Generis, the Act can not be construed to embrace aeroplanes.

5. The debates of Congress at the time of the enactment of the law clearly and conclusively show that aeroplanes were not intended to be included in the term "motor vehicle," as used therein.

6. Special legislation of Congress relative to aeroplanes refutes the contention of the Government in this case.

7. The majority opinion of the court below is in conflict with applicable decisions of other circuits, and of the United States Supreme Court, involving the construction of similar penal statutes.

These points will be discussed in their order.

POINT 1.

Being a penal Statute, the Act must be strictly construed.

> "301. General Rules. It has long been the well settled general rule that penal statutes are subject to the rule of strict construction. They will not be construed to include anything beyond their letter even though within their spirit, and nothing can be added to them by inference or intendment."

More correctly it may be said that such laws are to be expounded strictly against an offender and liberally in his favor. This can be accomplished only by giving to them a literal construction so far as they operate penally, or at most, by deducing the intention of the legislature from the words of the act." (25 R. C. L. 1081).

Further commenting Ruling Case Law states:

> "In extension of the letter of the law nothing may be assumed by implication, nor may the mischief intended to be prevented or redressed, as against the offender, be regarded in its construction. Criminal statutes which specifically enumerate acts, or places in which they shall be committed, and make them punishable as offenses, cannot be made to embrace other acts or places merely, because they may be said to be within the reason and policy of the law, for the reason that they are of equal atrocity and of a kindred character. The words of the statute must be such as to leave no reasonable doubt as to the intention of the legislature, and where there is any act and where there is any well founded doubt as to any act being a public offense, it should not be declared such, but should rather be construed in favor of the liberty of the citizen." (25 R. C. L. 1083-1084).
>
> See also U. S. v. Wiltberger, 5 Wheat 76, 5 U. S. L. ed.) 37, and,

First National Bank of Anamoose v. U. S. 205 Fed. 374.

In view of the fact that Congress, in enacting the Act, failed to use the word "aeroplane," or any similar word that indicates an intention to make the Statute applicable to aeroplanes, and since the term "motor vehicle," as will hereinafter be shown, has universally been applied to automobiles and other vehicles running upon the ground, petitioner maintains that the application of the above rule eliminates aeroplanes from consideration in enforcing the act.

POINT 2.

The Language of the Act Does not Clearly Indicate the Crime Charged.

The Act does not contain the word "aeroplane;" neither does it contain any similar words, such as "aircraft," "airship," "flying machine," etc. On the other hand, the specific terms in the Act apply only to automobiles and like conveyances. In order therefore, for an aeroplane to be embraced in the Act, it is necessary to read the word "aeroplane," or some similar word into it by judicial construction of the definition of "Motor vehicle," as contained therein.

The following authorities show conclusively, we believe, that this cannot be done:

"There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statutes. United States v. Lacher, 134 U. S., 624, 628; 33 L. Ed., 1083; 10 Sup. Ct. Rep., 625." (Fasulo v. United States, 272 U. S., 620; 71 L. Ed., 443).

"Statutes will not be read to create crimes, or new degrees or classes of crimes, unless the purpose so to do is plain." (United States v. Noveck, 271 U. S., 201; 70 L. Ed., 905).

"Regard is always to be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress. United States v. Lacher, 134 U. S., 624, 628, 33 L. Ed., 1080, 1083; 10 Sup. Ct. Rep., 625; Todd v. United States, 158 U. S., 278, 282; 39 L. Ed., 982, 983; 15 Sup. Ct. Rep., 889; Fasulo v. United States, 272 U. S., 620, 629; 71 L. Ed., 443, 445; 47 Sup. Ct. Rep., 200." (Donnelley v. U. S., 276 U. S., 511; 72 L. Ed., 678).

This same view in the construction of criminal statutes has long been observed by the Circuit Court of Appeals of the Eighth Circuit.

In the case of United States vs. The First National Bank of Anamoose, the defendant bank was charged with violating Section 239 of the Penal Code, which act made it a crime for "any railroad company, express company, or other common carrier, or any other person" to act as the agent of the seller for collecting money for the sale of intoxicating liquors. The trial court construed the phrase **"any railroad company, express company, or other common carrier, or any other person"** to contemplate and include the First National Bank of Anamoose, which had collected a draft with a bill of lading attached, through the regular course of business. This case is almost identical with the case at bar, so far as general principles are concerned. The case was appealed to the United States Court of Appeals, Eighth Circuit, and Justice Sanborn, in his opinion in the case, comments as follows:

> "(1) The statute creates and denounces a new offense. A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not by the expressed terms of the law clearly within the class of persons, or within the class of acts, it denounces will not sustain a conviction thereunder. One ought not to be punished for a new offense unless he and his act fall plainly within the class of persons or the class of acts condemned by the statute. An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expressions or by the expung-

ing of some of its words by the judiciary. Ex post facto construction is as vicious as ex post facto legislation.

"To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those which are enumerated. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words in search of an intention which the words themselves did not suggest. **United States** v. **Wiltberger,** 18 U. S. (5. Wheat.) 76, 96, 5 L. ed. 37; **United States** v, **Ninety-nine Diamonds,** 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185, and cases there cited,

"The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden significance reached by the reflection and ingenius reasoning of unusually strong and acute minds" **(First Nat. Bank of Anamoose v. United,** 206 Fed. 374.)

The foregoing authorities appear to refute conclusively the Government's contention in this case.

POINT 3.

The Language of the Act, in the light of both Legal and General Usage, Shows Conclusively that Aeroplanes Were not Intended to be Embraced therein.

For convenience, we again quote the definition of motor vehicle as contained in the Act:

"408 * * * The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motorcycle, or any

other self-propelled vehicle not designed for running on rails." (Title 18, Sec. 408, U. S. Crim. Code),

The word "vehicle," and the term "motor vehicle," insofar as they apply to conveyances, have been applied universally to vehicles that travel on land, both in their common and legal usage.

The Word "Vehicle"

The following definitions of "vehicle," are pertinent here:

"4. 'Vehicle', as Including All Means of Land-Transportation. The word 'vehicle' includes every description of carriage or other artifical contrivance used, or capable of being used, as a means of transportation on land. Sec. 4, Title 1, of the U. S. Code."

"Vehicle 1. That in or which anything is or may be carried; especially a contrivance with wheels or runners for carrying something. A conveyance as a carriage, wagon or car; **Specific, in Law, any Artificial Contrivance Used or Capable of Being Used as a Means of Transportation on Land."** Standard Dictionary Ed., 1928.

Cyc. states:

"Vehicle. Any carriage moving on land, either on wheels or on runners; * * * " (39 Cyc., 1125.)

The footnote to the above text on vehicles reads as follows:

"The term is rarely applied to water craft and does not therefore apply to a ferry-boat." (Duckwell v. New Albany, 25 Ind., 283-286.)

"Railroad cars which only run on a permanent, continuous track are not 'vehicles' in the ordinary and usual sense of the term." (Baltimore, etc., R. Co. v. District of Columbia, 10 App. Cas.) (D. C. 111, 120.)

The opinion of the court below cites the definition of vehicle" in the Century Dictionary, as follows:

> "F. Vehicle, L. Vehiculum", meaning a 'conveyance, carriage, ship.' It defines the word as, 'Any receptacle, or means of transportation, in which something is carried or conveyed or travels." (R. 172).

The above definition, however, is followed by the following definition:

> "Esp. A carriage or conveyance moving on wheels or runners;" * * *

Definition and use of the term "Motor Vehicle"

This term apparently came into existence with the automobile, and in its legal and common usage has been entirely confined to the automobile and like motor-driven conveyances that travel on the ground.

Volume 28 of "Cyc", copyrighted in 1908, devotes some 30 pages to the subject of "motor vehicles". In this article, the term is used synonymously with the word "automobile", and like vehicles, and is confined exclusively to such conveyances.

In Volume 42 of Corpus Juris, copyrighted in 1927, eight years after the passage of the National Motor Vehicle Theft Act, 843 pages (563 to 1410) are devoted to the subject of "motor vehicles". In the 800 pages of this exhaustive discussion, nothing but automobiles and like conveyances that run upon the ground are discussed or referred to. A cursory examination of each page of the article indicates that the word "aeroplane" was never used in the text nor in the numerous notes on each page. The author seems to assume as a matter of course, that the term "motor vehicle" applies only to automobiles and like conveyances.

Volume 2 of Corpus Juris on the other hand, treats of "Aerial Navigation". An examination of the ten pages of this article and the numerous notes accompanying it, so far as we are able to find, does not disclose the use of the term "motor vehicle" even once. It is simply not thought of in that connection.

In Ruling Case Law, Vol. 19, Page 677, the following index appears: "Motor Vehicles. See automobiles, Vol. 2, p. 1164."

The New International Encyclopedia, in Vol. 16, copyrighted in 1917, devotes 13 pages (337 to 350) to the discussion of the subject of "motor vehicles". It defines the term as follows:

> **"Motor Vehicle (Ger. Motor-Wagon).** A carriage for the transportation of passengers or a truck for transportation of freight, fitted to run on streets and highways without a track, * * * "

The above definition is followed by an exhaustive discussion, both historic and scientific, of automobiles and like conveyances that run upon the ground, with many drawings of automobiles, etc. But there seems to be no reference that would in any way connect the term "motor vehicle" with any form of aircraft.

Volume 1, of the International Encyclopedia, pages 172 to 187, on the other hand, treats of 'Aeronautics", but the term "motor vehicle" is never used therein.

The Air Commerce Act of the United States (Sec. 176-1 to 176-14, Title 49, U. S. Code), approved May 20, 1926, seven years after the passage of the National Motor Vehicle Theft Act, never in any instance makes use of the term "motor vehicle." It uses a terminology distinctively belonging to airplanes, such as "aircraft," "airspace," "airworthiness," "air navigation,' ' "air-

ports," and "navigable airspace." It also has the following provision relative to the words "vessel", and "vehicle:"

> "(a) The navigation and shipping laws of the United States, including any definition of "vessel," or "vehicle," found therein * * * shall not be construed to apply to seaplanes or other aircraft. (Title 49, Sec. 176, U. S. Code.)

In the Statutes of the Various States, the laws applicable to automobiles and like conveyances are invariably listed under the subject of "motor vehicles."

In Kansas, for instance, Chapter 206, Statutes of 1925, begins as follows:

> "Section 1. (a) The term 'motor vehicle,' when used in this act, means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or track."

In the Code of Iowa, 1927, 251, entitled "motor vehicle and law of Road," a motor vehicle is defined as follows:

> "1. The term 'motor vehicle' shall include all vehicles, propelled by any power other than muscular power except traction engines, road rollers, and such vehicles as are run only upon tracks or rails."

An examination of the statutes of some fifteen or twenty of the states, including Massachusetts and New York, shows that highway regulation of automobiles and like conveyances is treated under the term "motor vehicles," and it is reasonable to conclude that it is likewise true of the other states.

The above definition from Kansas is almost identical with the definition found in the National Motor Ve-

hicle Theft Act, but it could not possibly be construed to apply to airplanes, as the act treats of regulations peculiar to automobiles and like conveyances that use the roads, with no thought otherwise.

The Court below quotes as authority in construing the term "motor vehicle," Corpus Juris, Volume 42, page 609, Sec. 1, (R. 173) which reads as follows:

> "A 'motor vehicle' is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials; and as the term is used in the different statutes regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracks."

The real meaning of the definition is determined, however, by the authorities on which it is based. An examination of these authorities shows that invariably the subject matter has to do with automobiles or like conveyances that run on the ground. Then too, the definition is followed by 800 pages of data dealing entirely with principles, statutes and decisions concerning automobiles, and like vehicles, and none of which apparently deal with aircraft directly or indirectly.

Usage of the term "motor vehicle" certainly eliminates aeroplanes or aircraft of any kind from classification under the definition of that term in the Act.

POINT 4.

Under the Doctrine of Ejusdem Generis the Act Cannot Be Construed to Embrace Aeroplanes.

The well known rule of construction, "ejusdem generis," is particularly applicable in construing the defini-

tion of "motor vehicle", as used in the National Motor Vehicle Theft Act, for the reason that this definition begins with the specific terms "automobile, automobile truck, automobile wagon, motorcycle," and closes with the general phrase, "or other self-propelled vehicles not designed for running on rails."

The doctrine of "ejusdem generis" is almost universally recognized. It is well defined by Cyc:

> "(11) **Doctrine of Ejusdem Generis.** By the rule of construction known as ejusdem generis, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like,' and to include only others of like kind or character" (36 Cyc. 1119).

This doctrine has long been recognized by the Circuit Court of Appeals of the Eighth Circuit. Section 2 of the syllabus of the opinion by Judge Sanborn, quoted above in the case of the First National Bank of Anamoose vs. United States, is particularly applicable to the case at bar:

> "2. Statutes—Construction—Ejusdem Generis Definition of Crime. The rule that, where general words follow the enumeration of particular classes of persons or of acts, the general words should be

construed to apply to persons or acts of the same general nature or class of those enumerated, is especially applicable to statutes defining crimes and regulating their punishment." First Nat. Bank of Anamoose, v. U. S., 206 Fed 374.

In the case of Parman v. Lemmon, 120 Kan. 370, the court passed upon the construction of a penal statute of that state beginning as follows:

"Any person who shall sell, trade, give, loan or otherwise furnish any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie knife, brass knuckles, slung shot, or other dangerous weapons, * * * "

The syllabus of the above case states:

"Weapons—Dangerous Weapons—Shotguns. In enacting chapter 106 of the Laws of 1903 (R. S. 38-701, 38-702), it was not the intention of the legislature that the words 'other dangerous weapons' contained therein, should include shotguns."

The following case is most applicable:

"This aeroplane as operated by Whitted cannot be called a common carrier of passengers. It cannot be designated **a public conveyance, provided by a common carrier for passenger service only**, as the policy contract contemplated. The connection in which these general words are used with the other conveyances mentioned in the policy contract strengthens this conclusion. The conveyance mentioned in the policy are 'railroad car, steamboat, automobile, omnibus, or cab,' and then follows the more general words or phrase, 'or other public conveyance provided by a common carrier for passenger service only.' **This aeroplane is not a conveyance of the same kind or species** as the others enumerated in the policy contract. **It was used to fly in the air; and the other conveyances enumerated are used on**

land or water." No. Am. Acci. Ins. Co. v. Pitts (Ala.), 104 So. 21, 40 A. L. R. 1171.

It, therefore, clearly appears that the application of the rule to the definition of the term "motor vehicle" in the National Motor Vehicle Theft Act is analogous to its application in the above cases, and that, when applied, the term "motor vehicle" must be confined to automobiles and like conveyances mentioned in the first part of the definition, all of which travel on the ground; and that the word "airplane" cannot be read into, or implied as coming within the meaning of the term "motor vehicle" as used in the act. As indicated by the Alabama case quoted above, there are now three general modes of transportation, by land, by water, and by air. The conveyance used in each is in principle of construction very different from the other two, and the phraseology describing one class certainly cannot be used to include or describe the other class.

Application of this Rule of Ejusdem Generis to the Phrase "Any Other Self Propelled Vehicle"

It is the contention of the Government that the phrase "any other self-propelled vehicle," includes "aeroplanes." In order to sustain this contention under the above rule, it is necessary to place aeroplanes in the same class with automobiles, in construing the statute. The majority opinion of the Appeals Court below, sustains the Government's contention by the following reasoning:

> "Furthermore some meaning must be ascribed to the general phrase "any other self-propelled vehicle," which Congress wrote into the Act. It specifically enumerated all of the known self-propelled vehicles designed for running on land. It used the word "automobile" a generic term, which includes all self-propelled motor vehicles that travel on land

and are used for the transportation of passengers, except those designed for running on rails. 42 C. M. p. 939, Sec. 2.

"We conclude that the phrase "any other self-propelled vehicle" includes an airplane, a motor boat and any other like means of conveyance or transportation which is self-propelled, and is of the same general class as an automobile and a motor cycle."

This conclusion is untenable first, because the history of the phrase shows a long usage in connection with automobile traffic law, beginning as early as 1902, when aeroplanes were unknown.

History of the Phrase. The phrase did not originate with the National Motor Vehicle Theft Act. In the General Statutes of Connecticut, Revision of 1902, we find the following definition of the term "motor vehicle," in traffic laws governing the speed of motors:

"Whenever the term "motor vehicle" is used in this section, it shall include all vehicles propelled by any power other than muscular, excepting the cars of electric and steam railways and other motor vehicles running upon rails or tracks."

This language is substantially the same as in the Act in question, if anything, it is broader and more sweeping, but it could not have been intended to include aeroplanes, for they were not in existence. It applied only to vehicles traveling on the ground. Practically all of the states have statutes defining the term "motor vehicle," in similar language, covering a period of almost thirty years. The following examples will suffice to show this general usage:

The laws of Delaware, 1904-1905, Chapter 124, page 213, defines the term "motor vehicle," as follows:

"Wherever the term 'motor vehicle,' is used in this act it shall be construed to include automobiles, motorcycles and all other vehicles propelled wholly otherwise than by muscular power, excepting cars of electric and steam railways and other motor vehicles running upon rails or tracks. * * *"

The General Code of Ohio, 1910, Chapter 21, page 2303 states as follows:

"Section 6310. The term 'motor vehicle' as used in this chapter and in the penal laws, except where otherwise provided, includes all vehicles propelled by power other than muscular power, except traction engines, motorcycles, road rollers, traction engines, fire engines, police patrol wagons, ambulances and vehicles that run upon rails or tracks."

The term is again defined in the laws of Michigan, 1913, as follows:

"The term 'motor vehicle' as used in this act, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except motorcycles, operated by policemen or firemen on official business, traction engines, road rollers, fire wagons, fire engines, police wagons, ambulances and such vehicles as run only upon rails or tracks." (Howell's Michigan Statutes, Vol 2, 1913, page 1147.)

The laws of Missouri, 1913, provide:

"The term, 'Motor Vehicles,' as used in this article, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except traction engines, road rollers, fire wagons, and engines, police patrol wagons, ambulances, and such vehicles as run only upon rails or tracks."

Congress, in traffic legislation for the District of Columbia, uses the following sweeping definition:

(a) The term "motor vehicle," means all vehicles propelled by internal-combustion engines, electricity, or steam, except traction engines, road rollers, and vehicles propelled only upon rails and tracks." Code of the District of Columbia, 1929. Chapter 9, Regulation of Traffic.)

It would be quite as logical to include aeroplanes in the above definition, as in the similar definition in the National Motor Vehicle Theft Act, but we do not believe Council for the Government would so contend.

The foregoing statutes, we believe, show conclusively that the phrase, "other self-propelled vehicles not designed for running on rails," as used in National Motor Vehicle Theft Act, was borrowed from the State statutes concerning "motor vehicles," beginning prior to the invention of aeroplanes, and applying invariably and exclusively to automobiles and like vehicles that run on the ground. Even though the phrase is rather comprehensive and broad, usage has defined its limits, and it is not necessary to look for a hidden meaning to give it effect. In the light of the history of this phrase, it is clear that Congress used it in the same sense that the state statutes have used similar phrases since the beginning of the automobile industry, and it certainly cannot be construed to refer to and include aeroplanes.

The conclusion of the court below that the Act enumerates "all of the known self-propelled vehicles designed for running on land," is, we maintain, likewise erroneous and untenable. "Automobile," is simply one of four vehicles named, all apparently of equal importance." The repetition of the word "automobile," as an adjective before the words "truck" and "wagon," is clearly for the purpose of differentiating such vehicles from horse drawn vehicles that perform similar service. The adjective

"motor" would serve the same purpose. The words "automobile, automobile truck," will be found in the Kansas traffic statute quoted under Point 3. There are a number of other vehicles that are as different from any of these four as they are from each other. For example, the large "motor buses," carrying twenty or thirty passengers, and now running on regular schedule over the highways from coast to coast were little known at the time of the passage of the act. No one would think of using any one of the words "automobile, automobile truck, motor wagon, motorcycle" used in the Act in referring to a "motor bus;" and if any one of such words were used, it would not intelligently convey the idea of a "motor bus," to anyone. The same might be said of a hospital ambulance. It is significant that the words "motor bus," appear in the Kansas highway traffic statute of 1925, quoted above under point 3.

There are a number of other words of rather common usage applying to automobiles and like conveyances, such as "motor car," (Ency. Brittanica), "motor carriage," (Appleton's New. Pract. Ency. 1920, Vol. 4), "bus," "car," 'roadster,' 'coupe,' 'phaeton,' 'sedan' 'limousine' 'brougham, (See cut. Standard Dict. p. 1618-1619).

It is obvious, therefore, that Congress intended the phrase "any other self-propelled vehicle not designed for running on rails," to include new or improved vehicles, of the same class that run on the ground but having different usage from those designated, such, as "motor bus," or "ambulance," and to include any new trade or coined names that might be applied to the same or similar conveyances, such as those last mentioned above. No other explanation is necessary to give the phrase legal effect.

The Court below holds in effect that aeroplanes, motor boats and automobiles are of the same class, and that therefore the rule of Ejusden Generis is not violated in holding that the phrase "any other self-propelled vehicle" includes aeroplanes within the meaning of "motor vehicles." It states

> "We conclude that the phrase "any other self-propelled vehicle" includes an airplane, a motor boat and any other like means of conveyance or transportation which is self-propelled and is of the same general class as an automobile and a motorcycle."(R. 174)

This classification is so general as to fall neither within the letter nor spirit of the Act. In fact, it goes to the other extreme and eliminates all limitation, thus rendering the specific words of the definition useless. If it includes airplanes and motor boats, why not Zeppelins and ocean liners. It is much more reasonable to assume that Congress intended that the clearly expressed words of the Act are there for the purpose they express, than it is to hunt for a hidden meaning of the general phrase that in effect completely eliminates any use for the specific words.

The best guide to classification of these vehicles is statutory law and legal and general literature. For example. Corpus Juris, treats of Aeroplanes, under the subject "Aerial Navigation" (2 C. J., 299); of automobiles and like conveyances that run on the ground, under "motor vehicles," and watercraft, under "Admiralty," (C. J. 1248) and "Shipping" (36 "Cyc" 1), The International Encyclopaedia, has a similar classification: See Automobile Vol. 2, p. 432; Aeronautics Vol. 1 P. 172; "Motor Boats" Vol. 16 p. 333; "Motor Vehicle" Vol. 16 p. 337.

The important thing about an aeroplane that differentiates it from all other modes of travel is the fact that it flies,—not that it moves by means of a motor. This fact has given rise to a new body of statutory law, and many new questions of general law. Statutory law, federal and state, invariably treats of these vehicles in three separate classes. In fact practical use forces such separate classification.

The whole situation is well summed up in the Alabama case quoted above, as follows:

> "The conveyances mentioned in the policy are 'railroad car, steamboat, automobile, omnibus, or cab;' and then follows the more general words or phrase, 'or other public conveyance provided by a common carrier for passenger service only.' This aeroplane is not a conveyance of the same kind or species as the others enumerated in the policy contract. It was used to fly in the air; and the other conveyances enumerated are used on land or water." (No. Am. Acci. Ins. Co, v, Pitts (Ala.), 104 So, 21, 40 A. L. R. 1171).

Land travel has its own terminology, such as "wagons", "carts", "automobiles", 'motor vehicles' 'cars,, "trains", etc.; water travel has its own terminology, such as "vessels", "ships", "motor boats", "liners', etc. It remained for the Twentieth Century to develop the first new mode of travel in history,—that by air. This new method of travel is likewise developing a new terminology of its own, such as "aeroplanes", "airships", "flying machines", Zeppelin", etc. It is confined neither to land nor to water in its operations. Colonel Lindbergh used the same aeroplane in crossing the Atlantic that he used in flying over North and South America.

It is obvious, therefore, that the aeroplane can not be classed either with automobiles or motor boats, and is not a "motor vehicle" within the meaning of the Act.

It is contention of the Petitioner, therefore, that under the Doctrine of Ejusdem Generis, the Appeals Court below was in error in holding that the term "motor Vehicle," includes and embraces aeroplanes.

POINT 5

The Debates of Congress at the Time of the Enactment of the Law, Clearly and Conclusively Show That Aeroplanes were not Intended to be Included in the Term "Motor Vehicle," as Used Therein.

This Honorable Court has recognized the value of the debates of Congress in ascertaining the purposes of legislation in the following cases:

> "That such was the purpose is established by the Congressional Debates. 58 Cong. Rec. pt., 5, pp. 4577-4585; 66 Cong, 1st Sess." (Work v. Braffet, 276 U. S. 560, 566; 72 Ed., 700-3).
>
> See also Blake v. National City Bank, 23 Wall. 407-321, 23 L. Ed. 119.

The debates in connection with the enactment of the National Motor Vehicle Theft Act, are of unusual value in construing the statutes, and, we believe, show conclusively that it was not the purpose of Congress to include areoplanes.

Some fifteen or twenty members in the House and Senate took part in the discussion leading up to the enactment of this law, including **Mr. Dyer, the author of the Act.** The House debates appear on pages 5470 to 5578, Vol. 58, Part 6 of the Congressional Record, and the Senate debates appear on pages 6433 to 6435, Vol. 58,

Part 7 of the Congressional Record. An examination of these debates shows that neither the word "airplane" nor any reference to aircraft of any kind is made by any member of Congress in discussing the National Motor Vehicle Theft Act, although a number of the most prominent members, including Mr. Dyer, author of the act, and Senators Cummins, Brandegee and Hitchcock, took part. On the other hand, by actual count, the word "automobile" appears in these debates more than 80 times. Mr. Dyer, the author of the act, opens the debate as follows:

> "Mr. Dyer: Mr. Speaker, and gentlemen of the House, this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State" (Con. Rec. Vol. 58, Part 6, page 5470).

In outlining the purpose of the Act, Mr. Dyer states:

> "It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one state to another. Section 4 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it." (Cong. Rec. Vol. 58, Part 6, page 5472).

With regard to the consideration given the bill by the various committees, Mr. Dyer states:

> "This bill has been given very careful consideration by the Committee on the Judiciary. The full committee, with the earnest desire to present to the House a measure that would as far as possible wipe out the numerous stealings of automobiles, gave most careful consideration to the same. Prior to doing so it was considered by a subcommittee of the Committee on the Judiciary, and after its consideration by the full committee and after a number of

meetings changes were made in it from time to time, and the bill as finally agreed upon was introduced by me and given its present number. But prior to this the bill had been considered in substantially the same form for some time, and at a meeting some time ago the Committee on the Judiciary directed that my bill be reported to the House favorably and unanimously."

It will, therefore, be seen that the bill had unusual consideration by the various committees and Mr. Dyer unquestionably states the common view of these committees, namely, that this law applies to automobiles and like conveyances only. And in none of the debates is there even an inference that anything else is intended by the law except automobiles and like conveyances.

As to the reasons for enacting the law, Mr. Dyer further states:

"At the present time there is a great emergency demanding this kind of legislation. In the United States at this time there are in use approximately 6,500,000 automobiles. During the past year the number of thefts of automobiles has been very large throughout the United States, and particularly in some cities of the Middle West. In Chicago 2,500 thefts of this kind have occurred. St. Louis had 2,241 automobiles stolen, and other cities in proportion. * * * It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 per cent. It is automobiles of that price that are generally stolen. Automobile thieves who make a specialty of this crime do not steal many of the higher-priced cars, the reason being, of course, that they are not so easily sold. * * * Thieves have found the

automobile field one in which they can reap huge harvests, due to the fact, no doubt, that there are so many automobiles now in use in the United States." (Cong. Record, pp. 5470-5471).

Other members spoke as follows:

"Mr. Reavis: Bearing in mind that the offense defined by this measure is the transportation of a **stolen automobile** from one State to another,' * * * " (Cong. Record, Vol. 58, part 6, p. 5472).

"Mr. Bee: Another suggestion that occurs to me is why single out automobiles? I make no appeal merely because it is an automobile, for the automobile is the vehicle of everybody. But why should a man be permitted to take a carload of cattle and transport them from Texas to Missouri and have the authorities go through the slow process of extradition by the governor before he can be brought back into the State of Texas? Why should we not include a carload of grain that might be stolen, or a bale of cotton, or a carload of hogs, or hundreds of other things that might be mentioned, * * * " (Cong. Record, Vol. 58, part 6, p. 5474).

"Mr. Cummins: I ask unanimous consent for the present consideration of the bill (H. R. 9203) to punish the transportation of stolen motor vehicles in interstate or foreign commerce."

"Mr. Smoot: Let the bill be read.

* * *

"Mr. Cummins: This is a House bill, and the Senate committee accepted in the main the work of the House. I see no substantial objection, however, to the point made by the Senator from Connecticut. The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, to dispose of the ve-

hicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached.

"Mr. Hitchcock: I realize that what the Senator says is true, but it seems to me a large number of automobile thefts are chiefly for the purpose of sale; most of the men who steal automobiles sell them; it is a regular business. If every sale must be under a certificate and must be registered, without any regard to interstate commerce or passing from one State to another, it seems to me it might be possible to put a stop to that illegitimate business." (Cong. Rec. Vol. 58, Part 7, pages 6431 and 6435)

The foregoing comments are particularly significant and valuable in construing the Act for these reasons: it clearly appears that the Act was given unusual consideration by the various committees, the reasons advanced apply wholly and only to automobiles and like conveyances, mostly to automobiles or "cars", and there is no disagreement among the members on this point.

On the other hand, none of the reasons for enacting this rather emergency legislation applied to airplanes then or now, and Congress certainly did not think of it in that light or intended that it should so apply.

POINT 6.

Special Legislation of Congress, Relative to Aeroplanes, Refutes the Contention of the Government in this Case.

The Air Commerce Act (Section 176-1 to 176-14, Title 49 of the U. S. Code) was enacted and became effective in May, 1926, more than four months before the alleged crime in the case at bar took place.

This act is of great importance in the construction of the National Motor Vehicle Theft Act.

First, an examination of its language and of its provision shows conclusively that Congress never intended to include aircraft in the conveyances covered by the National Motor Vehicle Theft Act. The term "motor vehicle" does not occur in it even once. The word "vehicle" is used only once, and that is for the negative purpose of stating that an airplane is not to be considered a vehicle in the navigation and shipping laws. This definition is as follows:

> "Sec. 7. **Application of Existing Laws Relating to Foreign Commerce.** (a) The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." (See Sec. 176-7, Title 49, U. S. Code.)

The purposes of the Act are very broad, and include the following:

> "(a) To encourage the establishment of airports, civil airways, and other air navigation facilities. * * *
>
> "(c) To study the possibilities for the development of air commerce and the aeronautical industry and trade in the United States and to collect and disseminate information relative thereto and also as regards the existing state of the art.

"(c) To investigate, record, and make public the causes of accidents in civil air navigation in the United States" (Sec. 176-2, Title 49, U. S. Code).

Under Section 176-9 of the Act, such terms as the following are defined: "Aircraft", "public aircraft", "civil aircraft", "airport", "emergency landing field", "air navigation facility", "civil airway" and "airman".

The Act also provides for Federal regulation not only of aircraft, but of airmen.

Section 176-3 of the Act reads in part as follows:

"(176-3). Regulatory powers; registration and rating of aircraft; examination and rating of airmen and air navigation facilities; air traffic rules; issue, suspension and revocation of certificates; procedure on suspension or revocation:

"(a) Provide for the granting of registration to aircraft eligible for registration. * * *

"(b) Provide for the rating of aircraft of the United States as to their airworthiness. * * *

"(c) Provide for the periodic examination and rating of airmen serving in connection with aircraft of the United States as to their qualifications for such service."

From the foregoing it will be seen that Congress considered the airplane as a separate and distinct means of transportation from navigation upon the sea and from transportation upon the land, and has consequently created a distinct body of law to control it and to develop it.

There is another distinction that must be considered in the light of the passage of the Air Commerce Act and

similar legislation. Up to this time, at least, it appears that such laws as the National Motor Vehicle Theft Act and other sections of the so-called Dyer Act, such as the White Slave Act, etc., apply only to persons or things that are under the direct control of the states; the purpose of all such statutes is to assist the states in those instance where it is difficult to enforce the state laws of grand larceny in the states, because of the difficulties involved by the transportation of such stolen vehicles into other states. This is clearly shown by the debates of Congress hereinbefore quoted.

In the case of aircraft, the national government has assumed jurisdiction of such means of transportation, and is enacting regulatory laws over both airmen and aircraft by way of inspection, examinations, licenses, etc. There is therefore no need for such a law as the National Motor Vehicle Theft Act in connection with the aircraft industry; and there will not be unless a time should come when so many planes are stolen and transported between states as to become a menace that the states through their grand larceny statutes cannot control.

The Air Commerce Act shows conclusively that Congress considers aircraft as an entirely separate class of vehicles from automobiles and like vehicles that run on the ground.

This situation, together with the control and regulation thereof by the Federal Government, should, it appears, eliminate aeroplanes from consideration as a motor vehicle within the purvue of the National Motor Vehicle Theft Act.

POINT 7.

The majority Opinion of the Court Below Conflicts with Applicable Decisions of the United States Supreme Court, and of other Circuit Courts, Involving the Construction of Similar Penal Statutes.

An examination of the majority opinion of the court below shows that the portion of the opinion holding that an aeroplane is embraced within the term "motor vehicle" is based on a rather loose definition of the word "vehicle" (R. 172), and of "motor vehicle" as defined by Corpus Juris, Volume 42, Page 609, R. 173, and upon the similarity of the purpose of the aeroplane and automobile. The opinion does not cite a case where this or other courts have passed upon a parallel situation in the same way.

On the other hand the following cases involving the construction of other penal statutes, petitioner believes, sustain his contention in this case so fully that they should have controlled the decision.

Fasulo v. United States, 272 U. S., 620; 71 L. Ed., 443.

United States v. Noveck, 271 U. S. 201; 70 L. Ed., 905.

First Nat. Bank of Anamoose v. U. S., 206 Fed., 374.

The pertinent portions of the above decisions have been quoted under point 2 herein. Attention is also directed to the following decisions which are applicable to this case:

"The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the act the words necessary to make that intention clear; that is we deem this a case for the appli-

cation of the often expressed consideration, aiding interpretation, that if a given instruction was intended, **it would have been easy for the legislative body to have expressed it in apt terms.** Farrington v. Tennessee, 95 U. S. 679, 689, 24 L. ed. 558, 561; Union National Bank v. Mathews, 98 U. S. 621, 627, 25 L. ed. 188, 189; Tompkins v. Little Rock & Ft. S. R. Co. 125 U. S. 109, 127, 31 L. ed, 615, 624, 8 Sup Ct. Rep. 762; United States v. Lexington Mill Co. 232 U. S. 399, 410, ante, 658, 662, 34 Sup. Ct. Rep. 337" (United States v. First National Bank of Detroit, Minnesota. 234 U. S. 260; 58 L. Ed. 1304)

"But the words of the statutes are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases." (Corona Coal Company v. U. S. 263 U. S. 537; 68 L ed 431)

"We are inclined to agree with this view; but, in any event the statute plainly relates only to the wife or children of a naturalized citizen, and we cannot interpolate the words "native born citizen" without usurping the legislative function." (Shung Fook, Petitioner v. White, as Commissioner. 264 U. S. 443; 68 L. ed. 781.)

See also Crook, Collector of Internal Revenue v. Harrelson, (decided Nov. 24. 1930); 75 L. ed. 50, See conclusion of this brief for excerpt.

Petitioner therefore maintains that the Court below erred in that its decision is contrary to the foregoing decisions.

CONCLUSION

In conclusion, Petitioner respectfully calls attention to the following excerpt from the very recent opinion of Mr. Justice Sutherland (November 24, 1930), in the case of Crooks, Collector of Internal Revenue v. Harrelson, et al:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But the application of the principle so nearly approaches the boundry between the exercise of the judical power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."

In the light of the above authority and similar authorities cited throughout this brief, Petitioner submits that the dissenting opinion of Circuit Judge Cotteral, in the Appeals Court below, correctly states the law applicable to this case: He states:

> "It would have been a simple matter in enacting the statute to insert as descriptive words, airplanes, aircraft, or flying machines. If they had been in the legislative mind, the language would not have been expressed in such uncertainty as "any other self-propelled vehicle not designed for running on rails." The omission to definitely mention airplanes requires a construction that they were not included. Furthermore, by excepting vehicles running on rails, the meaning of the Act is clarified. These words indicate it was meant to be confined to vehicles that **run** but not on rails, and it did not extend to those that **fly**. Is it not an unreasonable view that airplanes fall within the description of

self-propelled vehicles that do not run on rails? The question is its own answer.

The rule of **ejusdem generis** has special application to this statute. General words following a particular designation are usually presumed to be restricted so as to include only things or persons of the same kind, class, or nature, unless there is a clear manifestation of a contrary purpose. 25 R. C. L. pp. 996-7. The general description in this statute refers to vehicles of the same general class as those enumerated. We may assume an airplane is a vehicle, in being a means of transportation. And it has its own motive power. But is an airplane classified generally with "an automobile, automobile truck, automobile wagon, or motor cycle?" Are airplanes regarded as **other types of automobiles and the like?** A moment's reflection demonstrates the contrary. * * *

It is familiar knowledge that the theft of automobiles had then become a public menace, but that airplanes had been rarely stolen if at all, and it is a most uncommon thing even at this date. The prevailing mischief sought to be corrected is an aid in the construction of a statute. 25 R. C. L. 1016.

I am constrained to hold that airplanes were not meant by the Act to be embraced in the designation of motor vehicles, and that the indictment charged no offense against the defendant.".

Petitioner respectfully submits therefore that the National Motor Vehicle Theft Act does not apply to or include aeroplanes, that the indictment states no offense against the defendant and is void, and that the trial court was without jurisdiction; that the Appeals Court below erred in its majority opinion, in finding that the Act does apply to aeroplanes, and in sustaining the

indictment, and the jurisdiction of the trial court, and that its decision should be reversed and the case dismissed.

HARRY F. BROWN
Guthrie, Oklahoma,
Counselor for Petitioner.

APPENDIX

408. Motor Vehicles—Transportation, Etc., of Stolen Vehicles. This section may be cited as the National Motor Vehicle Theft Act. **The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;** the term 'interstate or foreign commerce' shall include transportation from one state or territory, or the District of Columbia, to another state, territory, or the District of Columbia, or to a foreign country, or from a foreign country to any state territory, or the District of Columbia. **Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both.** Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender; (Title 18, Sec. 408, U. S. Criminal Code of Procedure).

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 552

WILLIAM W. McBOYLE, PETITIONER,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

MEMORANDUM GIVING EXTRACTS FROM FEDERAL STATUTES (TAKEN FROM U. S. CODE) SUBMITTED BY PETITIONER PURSUANT TO CONSENT OF COURT, FEBRUARY 27, 1931.

SUPREME COURT OF THE UNITED STATES.

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The Code of the Laws of the United States of America.

* * * * * * *

Sixty-ninth Congress.

AN ACT

To consolidate, codify, and set forth the general and permanent laws of the United States in force December seventh, one thousand nine hundred and twenty-five.

* * * * * * *

SEC. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District

of Columbia, and of each State, Territory, or insular possession of the United States—

(*a*) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish *prima facie* the laws of the United States, general and permanent in their nature, *in force on the seventh day of December*, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. * * * (Preface to U. S. Code, page 1).

The Code of Laws of the United States of America.

TITLE 1.—GENERAL PROVISIONS.

Chapter 1. *Rules of Construction*—

* * * * * * *

3. "Vessel" as including all means of water transporation.—The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water (R. S. #3).

4. "Vehicle" as including all means of land transportation.—The word "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land (R. S. #4) (Title 1, Sections 3 and 4, U. S. Code).

TITLE 5.—EXECUTIVE DEPARTMENTS AND GOVERNMENT OFFICERS AND EMPLOYEES.

SECTION 77. *Restrictions on Payment of Expenses of Carriages or Vehicles for Personal or Official Use.*—

No part of any money appropriated by any Act shall be used for purchasing, maintaining, driving or operating any *carriage or vehicle* (other than those for the use of the President of the United States, the heads of departments * * * and all such *carriages and vehicles* so procured and used for official purposes shall have conspicuously painted thereon * * * (Title 5, Sec. 77, U. S. Code).

TITLE 5, SECTION 547.

Exchange of Motor-propelled Vehicles.—The Secretary of Agriculture may exchange motor-propelled and horse-drawn vehicles and boats in part payment for new motor-propelled or horse-drawn passenger carrying vehicles authorized to be purchased by him, to be used for the same purposes * * *. The Secretary of Agriculture may also exchange used parts, accessories, tires, or equipment of motor-propelled and horse-drawn vehicles in part payment for new parts, accessories, tires or equipment of such vehicles authorized to be purchased by him. * * * (Title 5, U. S. Code, Sec. 547).

TITLE 8. ALIENS AND CITIZENSHIP.

SEC. 118. *Motor Vehicles for Enforcement of Immigration and Chinese Exclusion Laws.*—The purchase, exchange, use, maintenance, and operation of *motor vehicles*, and allowances for horses, including *motor vehicles* and horses owned by immigration officers

when used on official business required in the enforcement of the immigration and Chinese exclusion laws * * * may be contracted for, etc. * * * (Title 8, U. S. Code, Sec. 118).

TITLE 10. ARMY—EXCHANGE AND INTERCHANGE OF PROPERTY.

SEC. 1272. *Motor Vehicles, Aircraft, etc.*—Subject to the approval of the Secretary of War, *motor-propelled vehicles, airplanes,* engines, parts thereof, * * * may be exchanged in part payment for new equipment of the same or similar character to be used, * * * (U. S. Code, Title 10, Sec. 1272).

TITLE 23. HIGHWAYS.

SEC. 51. *Transfer of Motor-propelled Vehicles and Equipment Belonging to Military Establishment to Department of Agriculture; Purposes of.*—The Secretary of War is authorized and directed to transfer such motor-propelled vehicles and motor equipment, including spare parts, * * * to the Department of Agriculture for use in the improvement of highways * * *.

SEC. 51-1. *Purchase of Vehicles to Replace Transferred Vehicles; Exchange of Vehicles.*—The Secretary of Agriculture is authorized to purchase from the funds provided for carrying out the provisions of the Federal Highway Act November 9, 1921, * * * not to exceed $40,000 for motor-pro-

pelled passenger-carrying vehicles to replace such vehicles transferred under authority of the Acts of February 28, 1919 * * * from the War Department and retained and used by the Secretary of Agriculture in the construction and maintenance of national forest roads or other roads * * * (Title 23, Sec. 51-1, U. S. Code).

TITLE 19. CUSTOMS DUTIES (TARIFF ACT, 1922).

Subtitle IV. Customs Administration. Administrative Provisions.

SEC. 231. *Definitions.*—When used in this subtitle—

(*a*) Vessel.—The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, or in water and in air.

(*b*) Vehicle.—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, or through the air (U. S. Code, Title 19, Sec. 231. See Amendment, 1930, as next quoted).

TARIFF ACT, 1930; ADMINISTRATIVE PROVISIONS.

Part 1, Definitions.

SEC. 401. *Miscellaneous.*—

When used in this title or in Part 1 of Title III—

(*a*) Vessel.—The word "vessel" includes every description of water craft or other contrivance used, or

capable of being used, as a means of transportation in water, *but does not include aircraft.*

(*b*) Vehicle.—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, *but does not include aircraft* (Stat. of U. S. passed at Second Session of 71st Congress, 1929-1930, Part 1, page 708. [Sec. 401 of Title IV of Act]).

AIR COMMERCE ACT OF 1926.

176-7. *Application of Existing Laws Relating to Foreign Commerce;* * * *.—(*a*) The navigation and shipping laws of the United States, including any definition of "vessel" or "vehicle" found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft (Title 49, U. S. Code, Sec. 176-7).

TITLE 39. THE POSTAL SERVICE.

SEC. 116. *Employees in Motor-vehicle Service; Classification; Salaries; Grades; Readjustment; Promotion;* * * *.—

Employees in the *motor-vehicle service* shall be classified as follows: * * *

General mechanics employed in the *motor-vehicle service* shall be promoted * * *.

Mechanic helpers employed in the *motor-vehicle service* shall receive a salary of $1600 per annum. * * *.

Driver mechanics employed in the *motor-vehicle service* shall be divided into five grades * * *.

Special mechanics, general mechanics, mechanics' helpers, driver mechanics, and *garagemen-drivers* in the *motor-vehicle service* shall be required to work not more than eight hours per day. * * * (Feb. 28, 1925, c. 368, #6, 43 Stat. 1060—U. S. Code, Title 39, Sec. 116).

Chapter 13, Air Mail (Sec. 461, Title 39).
Chapter 15, Railway Service.
(Above Act amended 1930.)

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority and dissenting opinions in the Circuit Court of Appeals (R. 171, 176) are published in 43 F. (2d) 273, 276.

JURISDICTION

The judgment sought to be reviewed was entered on September 8, 1930. (R. 177.) The petition for certiorari was filed in this Court on November 17, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an airplane is a "motor vehicle" within the meaning of the National Motor Vehicle Theft Act;

2. Whether petitioner was triable in the Western District of Oklahoma;

3. Whether the trial court erred in overruling petitioner's motion for a new trial.

STATUTE INVOLVED

The National Motor Vehicle Theft Act (Act of October 29, 1919, c. 89, 41 Stat. 324, 325; U. S. C. Title 18, Sec. 408), so far as pertinent, provides:

> SEC. 2. That when used in this Act:
>
> (a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails;
>
> (b) The term "interstate or foreign commerce" as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.
>
> SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by

a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

* * * * *

SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Oklahoma under an indictment charging him and another with transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane which they knew had been stolen. (R. 2, 5.) Petitioner was sentenced to serve three years' imprisonment and to pay a fine of $2,000. (R. 9.) The Circuit Court of Appeals for the Tenth Circuit, one judge dissenting, affirmed the judgment of conviction. (R. 176.)

The evidence for the Government (R. 13 *et seq.*) tended to establish, among other things, that petitioner, the owner of a commercial airport at Galena, Illinois, induced an aviator in his employ to go to Ottawa, Illinois, and steal an airplane belonging to another concern. Upon the arrival of the plane at petitioner's field, petitioner changed the plane's serial number and painted it over in order to conceal the alteration. Petitioner then gave his aviator $150 as expense money and directed him to fly the stolen plane to Amarillo, Texas. Peti-

tioner kept in touch with the aviator *en route* through prearranged code telegrams. When the plane reached Guymon, Oklahoma, petitioner instructed the aviator to sell or store the plane and return to Galena.

ARGUMENT

I

While the question whether an airplane is a "motor vehicle" within the meaning of the National Motor Vehicle Theft Act is not free from doubt, we submit that the better view is that held by the majority opinion in the Circuit Court of Appeals. That court said (R. 172–174):

> The primary question is whether an airplane comes within the purview of the National Motor Vehicle Theft Act. This act defines the term "motor vehicle," as follows:
>
> "The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self propelled vehicle not designed for running on rails."
>
> Counsel for McBoyle contend that the word "vehicle" includes only conveyances that travel on the ground; that an airplane is not a vehicle but a ship; and that, under the doctrine of ejusdem generis, the phrase "any other self-propelled vehicle" can not be construed to include an airplane.
>
> The Century dictionary gives the derivation of the word "vehicle" as follows, "F. Vehicule, L. Vehiculum," meaning a "con-

veyance, carriage, *ship.*" It defines the word as, "Any receptacle, or means of transport, in which something is carried or conveyed or *travels.*" (Italic ours.)

It will be noted that the Latin word "vehiculum" means a ship as well as a carriage.

Webster defines the word "vehicle" as follows:

"(1) That in or on which any person or thing is or may be carried, esp. on land, as a coach, wagon, car, bicycle, etc.; a means of conveyance.

"(2) That which is used as the instrument of conveyance or communication."

Corpus Juris, Vol. 42, page 609, Sec. 1, defines a motor vehicle, as follows:

"A 'motor vehicle' is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials; and as the term is used in the different statutes regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracks."

Both the derivation and the definition of the word "vehicle" indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities used for traveling on land, although the latter may be the limited or

special meaning of the word. We do not think it would be inaccurate to say that a ship or vessel is a vehicle of commerce.

An airplane is self-propelled, by means of a gasoline motor. It is designed to carry passengers and freight from place to place. It runs partly on the ground but principally in the air. It furnishes a rapid means of transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck, or motorcycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term "any other self propelled vehicle," does not offend against the maxim of ejusdem generis.

Furthermore, some meaning must be ascribed to the general phrase "any other self propelled vehicle," which Congress wrote into the Act. It specifically enumerated all of the known self-propelled vehicles designed for running on land. It used the word "automobile," a generic term, which includes all self-propelled motor vehicles that travel on land and are used for the transportation of passengers, except those designed for running on rails. 42 C. J. p. 609, Sec. 2.

We conclude that the phrase "any other self propelled vehicle" includes an airplane,

> a motor boat and any other like means of conveyance or transportation which is self-propelled, and is of the same general class as an automobile and a motor cycle.

The rules of construction to which petitioner refers in his brief (pp. 19 and 20) are not decisive of the question involved. They are but aids in determining the meaning of the statute. *Ash Sheep Company* v. *United States,* 252 U. S. 159, 170; *Mason* v. *United States,* 260 U. S. 545, 554. The decisive factors would seem to be that the phrase "any other self-propelled vehicle not designed for running on rails" is broad enough to include an airplane and that unless it is given such a construction the phrase is well-nigh meaningless. Petitioner's contention (Br., p. 22) that the phrase is a mere "catch-all" to include "any new trade or coined names that might be applied to" automobiles and motor cycles is not convincing.

II

Petitioner also contends that he was not triable in the Western District of Oklahoma where the plane was taken *en route* to Texas, its ultimate destination, because he did not personally take the plane there nor direct his aviator to take it there.

The point was thus disposed of by the Circuit Court of Appeals (R. 174):

> The crime of transporting a stolen motor vehicle in interstate commerce is a continuing offense. It is committed in each state

and district through which such vehicle is transported. It was not essential that McBoyle should have been physically present in the Western District of Oklahoma. The constitutional requirement is that the accused shall be tried in the state or district where the crime is committed, but not necessarily in the state and district where the accused was at the time the crime was committed. It is sufficient if the crime was committed in the Western District of Oklahoma and McBoyle caused it to be committed there.

Salinger v. *Loisel*, 265 U. S. 224, 235; *Burton* v. *United States*, 202 U. S. 344, 387; *In Re Palliser*, 136 U. S. 257, 265–268.

The jury was warranted in finding, from the evidence, that McBoyle caused Lacey to undertake to transport such airplane from Ottawa, Illinois, to Amarillo, Texas, that Lacey started from Ottawa and succeeded in flying as far as Guymon, Oklahoma, and that, upon telegraphic instructions from McBoyle, Lacey stored the airplane at Guymon and returned to Galena; and in concluding that McBoyle caused the offense to be committed in the Western District of Oklahoma.

See also *Millette* v. *United States*, 4 F. (2d) 635 (C. C. A. 7th), and cases cited.

Petitioner cites no decisions in support of his contention, and his theory overlooks the principle of criminal agency. He directed the theft of the plane in Illinois and its transportation to Texas.

In the absence of instructions by the petitioner, the aviator obviously had to choose his route. See *Wilson* v. *United States*, 232 U. S. 563, 567.

III

The overruling of petitioner's motion for a new trial is not reviewable. *Pickett* v. *United States*, 216 U. S. 456, 461. Furthermore, the Circuit Court of Appeals "examined the record and [was] convinced that the trial court did not abuse its discretion in denying" the motion. (R. 176.)

CONCLUSION

We submit that the decision below was correct, although the matter is not free from doubt. The case presents no conflict with any other decision. The petition should be denied.

Respectfully submitted.

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CLAUDE R. BRANCH,
NUGENT DODDS,
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JURISDICTION

The judgment to be reviewed was entered on September 8, 1930. (R. 177.) Petition for certiorari was filed in this Court on November 17, 1930, and granted January 12, 1931, pursuant to Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (R. 187.)

QUESTION PRESENTED

In granting the writ this Court limited the argument and briefs to the question "whether the National Motor Vehicle Theft Act applies to aircraft." (R. 187.)

STATUTE INVOLVED

The National Motor Vehicle Theft Act (Act of October 29, 1919, c. 89, 41 Stat. 324, 325; U. S. C. Title 18, Sec. 408), so far as pertinent, provides:

> SEC. 2. That when used in this Act:
>
> (a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails;
>
> * * * * *
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> SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.
>
> * * * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Oklahoma under an indictment charging him and another with transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane which they knew had been stolen. (R. 2, 5.) Petitioner was sen-

tenced to serve three years' imprisonment and to pay a fine of $2,000. (R. 9.) The Circuit Court of Appeals for the Tenth Circuit, one judge dissenting, affirmed the judgment of conviction. (R. 176.)

This Court on January 12, 1931, granted a writ of certiorari, but directed that the argument and briefs be limited to the question "whether the National Motor Vehicle Theft Act applies to aircraft." (R. 187.)

SUMMARY OF ARGUMENT

Section 2 (a) of the National Motor Vehicle Theft Act provides that, when used in this Act, "the term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." We maintain that the term "motor vehicle," as so defined, should be construed to include an airplane. This construction does not extend the words of the statute beyond their letter or add to them by inference or attribute to them a purpose which it is clear that Congress did not intend them to have.

An airplane is "self-propelled," and, of course, it is "not designed for running on rails." The definition of "vehicle" in the dictionaries include the following: "A conveyance" and "that in or on which anything is or may be carried." An airplane is a conveyance in which persons and things are carried. There is nothing in the context of this Act which shows that an airplane is not included

in the term "motor vehicle," and it is therefore unlike numerous other statutes relied upon by the petitioner. The provisions in regard to the word "vehicle" in Section 4, R. S., do not seem to be conclusive, as that section evidently was intended not to restrict, but to prevent restriction of the definition of that word.

None of the rules applicable to the construction of criminal statutes preclude our interpretation. "The admitted rule that penal statutes are to be strictly construed, is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature." *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170.

The construction which we present does not violate the rule of *ejusdem generis*, and, furthermore, some meaning must be ascribed to the general phrase, "any other self-propelled motor vehicle."

The legislative history of the Act does not show that it was not intended to apply to airplanes, although they were not specifically mentioned in the Act or in the reports of committees or in the debates. "But the question is not whether they were thought of for the purpose of inclusion but whether they were intentionally excluded from a description that on its face includes them." *Uravic* v. *Jarka Co.*, No. 32, October Term, 1930, decided January 5, 1931.

ARGUMENT

Section 2(a) of the National Motor Vehicle Theft Act provides:

> That when used in this Act—
>
> (a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.

We maintain that the term "motor vehicle," as so defined, should be construed to include an airplane. This construction does not extend the words of the statute beyond their letter or add to them by inference or attribute to them a purpose which it is clear that Congress did not intend them to have.

An airplane is "self-propelled," and, of course, it is "not designed for running on rails." Even the dissenting judge in the court below said (R. 176):

> We may assume an airplane is a vehicle, in being a means of transportation.

The lexicographers' definitions of the word "vehicle" are sufficiently broad to include the airplane. Thus the Century Dictionary shows that the word "vehicle" is derived from the Latin *vehiculum*, meaning a carriage, conveyance. It defines the word as follows—

> 1. Any carriage moving on land, either on wheels or on runners; a conveyance. 2. That which is used as an instrument of conveyance, transmission, or communication.

Webster defines the word "vehicle" as follows:

> (1) That in or on which any person or thing is or may be carried, esp. on land, as a coach, wagon, car, bicycle, etc.; a means of conveyance.
>
> (2) That which is used as the instrument of conveyance or communication; * * *

The Standard Dictionary defines "vehicle" as follows:

> 1. That in or on which anything is or may be carried; especially, a contrivance with wheels or runners for carrying something; a conveyance, as a carriage, wagon, or car; specific., in law, any artificial contrivance used or capable of being used as a means of transportation on land.

An airplane runs partly on the ground but principally in the air. In it persons and things are carried.

It is true that the term "motor vehicle" has often been used as not including the airplane. In most of such instances mentioned in the petitioner's brief, it is the context which shows that the word was not intended to include the airplane. In the Act under consideration the context gives no such indication.

The provisions in regard to the word "vehicle" in Section 4, R. S. (U. S. C., Title 1, Sec. 4), do not seem conclusive. That section reads:

> The word "vehicle" includes every description of carriage or other artificial con-

trivance used, or capable of being used, as a means of transportation on land.

This section originated in the Act of July 18, 1866. (14 Stat. 178). It was apparently intended, not to restrict, but to prevent restriction of definition. At the time of its origin aircraft were, of course, practically unknown, and there could have been no intention to exclude airplanes from the operation of statutes in which the word "vehicle" occurred.

The petitioner places reliance upon the fact that Section 7 of the Air Commerce Act of May 20, 1926 (44 Stat. 572), provides that any definition of "vessel" or "vehicle" found in the navigation and shipping laws shall not be construed to apply to seaplanes or other aircraft. Although this section seems to us to throw little light on the problem under consideration, we submit that if it shows anything, it is that in passing that Act Congress felt that it was necessary, or, at least, desirable, to provide that the word "vehicle" should not apply to aircraft. In contrast, the Act under consideration made no such exclusion.

We consequently submit the natural meaning of the language used is to include the airplane, and that nothing in any other statute prevents the language from having this meaning. This meaning should then be attributed to the language in question unless some aids to construction other than the language itself prevent. We submit that they do not.

The dissenting judge in the court below based his conclusion largely upon the following reasoning (R. 176):

> The omission to definitely mention airplanes requires a construction that they were not included. Furthermore, by excepting vehicles running on rails, the meaning of the Act is clarified. These words indicate it was meant to be confined to vehicles that *run* but not on rails, and it did not extend to those that *fly*.

Although these matters may properly be considered, they hardly seem sufficient to restrict the meaning of the language used.

We do not regard any of the rules applicable to the construction of criminal statutes as fatal to our interpretation. In *Donnelley* v. *United States*, 276 U. S. 505, 512, this Court said:

> * * * The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment.

The applicable rule is thus stated in *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170:

> "The admitted rule that penal statutes are to be strictly construed, is not violated by

> allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature."

Our argument does not conflict with the principles of construction applied in the cases upon which the petitioner chiefly relies, *Fasulo* v. *United States,* 272 U. S. 620, and *United States* v. *Noveck,* 271 U. S. 201.

Petitioner argues that the construction of the court below violates the rule of *ejusdem generis,* and the dissenting judge in the Circuit Court of Appeals agreed with this contention, being of the opinion that an airplane is not generally classified with "an automobile, automobile truck, automobile wagon" or "motor cycle," inasmuch as all of these vehicles travel only on the ground and an airplane flies. But, as the majority opinion said (R. 173):

> * * * It therefore serves the same general purpose as an automobile, automobile truck or motor cycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term "any other self-propelled vehicle," does not offend against the maxim of *ejusdem generis.*
>
> Furthermore, some meaning must be ascribed to the general phrase "any other self-

> propelled vehicle," which Congress wrote into the Act. It specifically enumerated all of the known self-propelled vehicles designed for running on land. It used the word "automobile," a generic term, which includes all self-propelled motor vehicles that travel on land and are used for the transportation of passengers, except those designed for running on rails. * * *

The reasoning of the petitioner is somewhat similar to that which was rejected in *Mason* v. *United States*, 260 U. S. 545, 554, wherein it was said:

> The rule is one well established and frequently invoked, but it is, after all, a rule of *construction*, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It can not be employed to render general words meaningless, since that would be to disregard the primary rules, that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate.

See also *Mid-Northern Co.* v. *Montana*, 268 U. S. 45, 49–50; *Danciger* v. *Cooley*, 248 U. S. 319, 326; *Caminetti* v. *United States*, 242 U. S. 470, 487;

United States v. *Mescall*, 215 U. S. 26, 31; *Cutler* v. *Kouns*, 110 U. S. 720, 728; *United States* v. *Briggs*, 9 How. 351.

Petitioner also contends that the legislative history of the Act shows that it was not intended to apply to airplanes. It is true that airplanes were nowhere mentioned in the committee reports or the debates, but the same is substantially true of motor cycles,[1] which are specifically included in the Act.

It is probable that the draftsman of the bill and those in charge of it did not consider the theft of airplanes at that time; as airplanes were not then very common, most of them then belonging to the Government. But the difficulty which the States have in enforcing their laws against theft as applied to automobiles is equally applicable to the theft of airplanes in the rare instances where this occurs. We submit that the following language used by this Court in construing the word "seamen" in Section 33 of the Merchant Marine Act in *Uxavic* v. *Jarka Co.* (No. 32, October Term, 1930, decided January 5, 1931) is applicable to airplanes in the statute under consideration:

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[1] Motor cycles were casually mentioned in debate by only one person, and he was not a member in charge of the bill. The report of the Judiciary Committee of the House (Report 312, 66th Congress, 1st session) indicates that the primary purpose of the Act was to strike at the theft of "the cheaper cars," but of course the scope of the Act was not limited to them.

But the question is not whether they were thought of for the purpose of inclusion but whether they were intentionally excluded from a description that on its face includes them.

Respectfully submitted.

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FEBRUARY, 1931.

NOTE.—The above brief has been prepared in support of the majority opinion of the Circuit Court of Appeals. I can not persuade myself that that decision is correct, but have signed the brief because I believe the question is one which this Court should decide for the guidance of Congress.

THOMAS D. THACHER,
Solicitor General.

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No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1930

WILLIAM W. McBOYLE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM SUBMITTED BY THE UNITED STATES GIVING EXTRACTS FROM RECENT FEDERAL STATUTES

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National Prohibition Act (approved October 28, 1919), c. 85, 41 Stat. 305, 315

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors

transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or other proceedings brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury

of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week, for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and cost shall be paid into the Treasury of the United States as miscellaneous receipts.

Tariff Act of 1922 (approved September 21, 1922); c. 356, 42 Stat. 858, 885, 938, 948

TITLE I

Dutiable List

Section 1. That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or

into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely:

* * * * *

PAR. 369. Automobiles, automobile bodies, automobile chassis, motor cycles, and parts of the foregoing, not including tires, all of the foregoing whether finished or unfinished, 25 per centum ad valorem: * * *

PAR. 370. Airplanes, hydroplanes, motor boats, and parts of the foregoing, 30 per centum ad valorem.

* * * * *

TITLE III

SPECIAL PROVISIONS

* * * * *

SEC. 308. That the following articles, when not imported for sale or for sale on approval, may be admitted into the United States under such rules and regulations as the Secretary of the Treasury may prescribe, without the payment of duty under bond for their exportation within six months from the date of importation:

* * * * *

(6) Automobiles, motor cycles, bicycles, airplanes, airships, balloons, motor boats, racing

shells and similar vehicles and craft, teams and saddle horses, all of which are brought temporarily into the United States by nonresidents for touring purposes, or for the purposes of taking part in races or other specific contests;

* * * * *

TITLE IV

CUSTOMS ADMINISTRATION, ADMINISTRATIVE PROVISIONS

PART I. DEFINITIONS

SECTION 401. When used in this title—

(a) *Vessel.*—The word "vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation in water or in water and in air.

(b) *Vehicle.*—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, or through the air.

Tariff Act of 1930 (approved June 17, 1930), c. 497, 46 Stat. 590, 625, 690, 708, 761

TITLE I

DUTIABLE LIST

SECTION 1. That on and after the day following the passage of this Act; except as otherwise spe-

cially provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam), the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely:

* * * * *

SCHEDULE 3. METALS AND MANUFACTURES OF

* * * * *

PAR. 369. (a) Automobile trucks valued at $1,000 or more each, automobile trucks and motor bus chassis valued at $750 or more each, automobile truck bodies valued at $250 or more each, motor busses designed for the carriage of more than ten persons, and bodies for such busses, all the foregoing, whether finished or unfinished, 25 per centum ad valorem.

(b) All other automobiles, automobile chassis, and automobile bodies, and motor cycles, all the foregoing, whether finished or unfinished, 10 per centum ad valorem.

* * * * *

PAR. 370. Airplanes, hydroplanes, motor boats, and parts of the foregoing, 30 per centum ad valorem. * * *

* * * * *

TITLE III

SPECIAL PROVISIONS

SEC. 308. TEMPORARY FREE IMPORTATION UNDER BOND FOR EXPORTATION.

The following articles, when not imported for sale or for sale on approval, may be admitted into the United States under such rules and regulations as the Secretary of the Treasury may prescribe, without the payment of duty, under bond for their exportation within six months from the date of importation, which period may, in the discretion of the Secretary of the Treasury (whether such articles are imported before or after this section becomes effective), be extended, upon application, for a further period not to exceed six months:

* * * * *

(5) Automobiles, motor cycles, bicycles, airplanes, airships, balloons, motor boats, racing shells, and similar vehicles and craft, teams and saddle horses, all of which are brought temporarily into the United States by nonresidents for touring purposes, or for the purposes of taking part in races or other specific contests;

* * * * *

TITLE IV

ADMINISTRATIVE PROVISIONS

PART I. DEFINITIONS

SEC. 401. MISCELLANEOUS.

When used in this title or in Part I of Title III—

(a) *Vessel.*—The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

(b) *Vehicle.*—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

* * * * *

PART VI

MISCELLANEOUS PROVISIONS

SEC. 644. APPLICATION OF AIR COMMERCE ACT OF 1926.

The authority vested by section 7 of the Air Commerce Act of 1926 in the Secretary of the Treasury, and in the Secretary of Commerce, by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of customs, and of the laws and regulations relating to the entry and clearance of vessels, respectively, shall extend to the application in like manner of any of the provisions of this Act or of any regulations promulgated hereunder.

Air Mail Act of February 2, 1925, c. 128, 43 Stat. 805

SEC. 1. That this Act may be cited as the Air Mail Act.

SEC. 2. That when used in this Act the term "air mail" means first-class mail prepaid at the rates of postage herein prescribed.

SEC. 3. That the rates of postage on air mail shall be not less than 10 cents for each ounce or fraction thereof.

SEC. 4. That the Postmaster General is authorized to contract with any individual, firm, or corporation for the transportation of air mail by aircraft between such points as he may designate at a rate not to exceed four-fifths of the revenues derived from such air mail, and to further contract for the transportation by aircraft of first-class mail other than air mail at a rate not to exceed four-fifths of the revenues derived from such first-class mail.

SEC. 5. That the Postmaster General may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act: *Provided,* That nothing in this Act shall be construed to interfere with the postage charged or to be charged on Government operated air-mail routes.

(This Act was amended by the Acts of June 3, 1926, c. 460, 44 Stat. 692; May 17, 1928, c. 603, 45 Stat. 594; and April 29, 1930, c. 223, 46 Stat. 259.)

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See also 40 Stat. 742, 746, 753 (Sec. 8)

44 Stat. 568, 572 (Sec. 7.)

SUPREME COURT OF THE UNITED STATES.

No. 552.—October Term, 1930.

William W. McBoyle, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 9, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner was convicted of transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane that he knew to have been stolen, and was sentenced to serve three years' imprisonment and to pay a fine of $2,000. The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit. 43 F. (2d) 273. A writ of certiorari was granted by this Court on the question whether the National Motor Vehicle Theft Act applies to aircraft. Act of October 29, 1919, c. 89, 41 Stat. 324; U. S. Code, Title 18, § 408. That Act provides: "'Sec. 2. That when used in this Act: (a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails; . . . Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both."

Section 2 defines the motor vehicles of which the transportation in interstate commerce is punished in Section 3. The question is the meaning of the word 'vehicle' in the phrase "any other self-propelled vehicle not designed for running on rails." No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e. g., land and air, water being separately provided for, in the Tariff Act, September 22, 1922, c. 356, § 401 (b), 42 Stat. 858, 948. But in everyday speech 'vehicle'

calls up the picture of a thing moving on land. Thus in Rev. Sts. § 4, intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used "as a means of transportation on land". And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, c. 997, § 401 (b); 46 Stat. 590, 708. So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words "any other self-propelled vehicle not designed for running on rails" still indicate that a vehicle in the popular sense, that is a vehicle running on land is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or in the debates in Congress. It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class. The counsel for the petitioner have shown that the phraseology of the statute as to motor vehicles follows that of earlier statutes of Connecticut, Delaware, Ohio, Michigan and Missouri, not to mention the late Regulations of Traffic for the District of Columbia, Title 6, ch. 9, § 242, none of which can be supposed to leave the earth.

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. *United States* v. *Thind,* 261 U. S. 204, 209.

Judgment reversed.